1879

Post 11-728

Filed April 15th

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 263.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, APPELLANTS,

vs.

JOHN HORNBY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 10, 1877.

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1, 2, 3 Pleas in the circuit court of the United States of America at a term thereof begun and holden at the United States court-room, at the city of Des Moines and district aforesaid, on the second Monday of May, the same being the 14th day of May, 1877, before Hon. Samuel F. Miller, one of the associate justices of the Supreme Court of the United States, Hon. John F. Dillon, circuit judge of the eighth circuit, and Hon. James M. Love, district judge for the district of Iowa.

4 Be it remembered that heretofore, to wit, on the 4th day of May, 1875, Lewis H. Meyer, by his solicitors, filed in the clerk's office of the circuit court of the United States for the district of Iowa, his bill of complaint against John Hornsby et al., which said bill is in the words and figures following, to wit:

5 Circuit court of the United States for the district of Iowa.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany & the Davenport Railway Construction Company & others.

To the judges of the circuit court of the United States for the district of Iowa:

1. Lewis H. Meyer, who avers that he is a citizen of the State of New York, brings this bill in equity against the Davenport & St. Paul Railroad Company, the Davenport Railway Construction Company, the
6 Deleware Construction Company, citizens of the State of Iowa; William Dennison, a citizen of the State of Ohio; Abraham Bibby, Andrew Mundy; Benjamin Burch, surviving partner of B. & H. M. Burch; A. R. Jones, John L. Davies & Son, Berderbeck & Miller, W. C. Wadsworth & Co., Francis W. French, R. Krause, Childs & Co., L. Lowenstein & Co., Lovell, Corbett & Co., M. Folley; Benjamin Burch, J. H. Lakin, Wm. Burch, composing the firm of Burch, Lakin & Co.; Robert Valentyne & Jason L. Payne; Sarah E. Burch, administratrix of the estate of H. M. Burch, deceased; Charles M. Lockwood, Richard Moore; H. S. Babcock, & Geo. H. French, his assignee; M. L. Rogers, First National Bank of Davenport, Hiram Price, Daniel Stevens, Richard Ellwood, John Hornby, Lewis Beal, C. T. Peet, Lucias How-
7 ard, Brown & Martin, The Deleware Railway Construction Company, Leroy Jackson, S. Denton & Co., Westfal & Heines, Elizor Davis, J. H. Leach, E. Hoag, L. S. Davies, surviving partner of John L. Davies & Son, all citizens of the State of Iowa, & The Western Car Company, a citizen of the State of Ohio.

2. Said Meyers avers that on the day of , 1873, he was appointed a trustee of the mortgage or deed of trust hereinafter named in place of John Edgar Thompson, who was a trustee under said deed of trust, & who departed this life on the 22d of May, A. D. 1874.

3. Said Meyer avers that his appointment was in accordance
8 with the powers conferred on the bondholders in a certain supplemental mortgage, made, executed, & delivered on the first day of July, A. D. 1871. A copy of said appointment is hereto annexed, marked Exhibit A.

4. That on the 1st day of July, 1871, there was executed & delivered to William Dennison, a citizen & resident of the State of Ohio, & John

Edgar Thompson, of the city of Philadelphia, State of Pennsylvania, a certain deed or indenture of mortgage, now shown to the court, a copy of which is hereto annexed and made a part hereof, marked Exhibit B, for the purpose of securing the payment of certain bonds also executed & delivered by said company to the amount of twenty thousand dollars per mile of the line of said company's road, upon which the work
9 of grading, bridging, & tieing shall have been completed, & to be issued from time to time as the said road shall progress, said bonds bearing interest at the rate of seven per centum per annum free of United States taxes, payable semi-annually on the first days of January & July in each year at the company's agency, either in New York, London, or Frankfort; said bonds, both principal & interest, is to be paid in gold coin.

5. Your petitioners aver that said bonds were of the denomination of one thousand dollars & were to be payable to John Edgar Thompson or bearer on the first day of July, one thousand nine hundred &
10 eleven (1911), in the city of New York, in United States gold coin, of or equal to the present standard.

6. That by the terms of said mortgage only $20,000 per mile for each mile of main line of said road upon which the work of grading, bridging, & tieing should have been completed, were to be issued & the issue was to continue in that manner as the road progressed.

7. That only one hundred & twenty-four miles of the main line of said line of said road was graded, bridged, & tied from Duck Creek, north of Davenport, to Fayette, & the said railroad company & said construction company & said trustees, pretending that 150 miles had been
11 so graded, bridged, & tied, issued & delivered to divers persons of whom the plaintiff is the trustee three millions of bonds, & in violation of said mortgage & its terms issued afterwards, without grading, bridging, & tieing any more than said 124 miles, issued to certain other persons about four hundred & fifty thousand dollars in bonds, which, your petitioner is informed, are valid in the hands of the holders, except those in the hands of Moses Dewitt Loomis, the original plaintiff in this suit.

8. That by said deed of trust, or mortgage, the said railroad corporation, to secure the payment of the principal & interest on said trust bonds, did grant, bargain, sell, & convey unto said parties of the
12 second part, & to their successor or successors, as trustees, all & singular, the road, bridges, & superstructure of the said Davenport & St. Paul Railroad, including all branches, side-tracks, additions, turnouts, right of way, depot grounds, coal lands, timber lands, & other lands, then owned, or thereafter to be acquired by said party of the first part; all depots, station houses, grain houses, engine houses, car houses, water tanks, freight houses, grain elevators, wood houses, coal houses, car shops, & machine shops, & all other buildings whatsoever now erected or hereafter to be erected.

Also, all kinds of machinery & tools now held and owned or hereafter to be acquired by said party of the first part, for use in con-
13 nection with the said railroad, including all locomotives, tenders, cars, or other rolling stock or equipment, & all tools, implements, fuel, & materials of every kind used or procured for use in the constructing, operating, repairing, or replacing any part or parcel of said railroad, or any part of its appurtenances; also, all property & franchises connected with or relating to said railroad, or any part of its business in any wise whatever, which was held or thereafter to be acquired by the said party of the first part; and, also, all rights, claims,

& benefits in or to any lease, contract, or agreement now made, or which may be hereafter made by the first party with any person or persons whomsoever, together with, all & singular, the tenements & ap-
14 purtenances thereto belonging, or in any wise appertaining, & the reversions, remainders, tolls, incomes, rents, issues & profits thereto; and, also, all the estate, right, title, & interest whatsoever, as well at law as in equity, of the said party of the first part, of, in, to, or out of the same, & every part & parcel thereof.

To have and to hold said railroad & property & appurtenances to said trustees & their successors in trust, & assigns, the following express trust among others, that in case the said railway company should fail to pay said principal, or any part thereof, or any of the interest, or any part thereof, or any of the bonds secured, or intended to be se-
15 cured by the same at any time when or where the same might become due & payable, according to the tenor thereof, & for sixty days thereafter, & if such default should continue for six months, then, & in either case, all of said bonds, both principal & interest, should thereupon become due & payable; & said trustees, their successor or assigns, at their direction & on the written request of the holders of one-fourth of said bonds then unpaid, should cause the said premises, or so much thereof as should be necessary to discharge said principal & interest of all the bonds unpaid, together with the expense of sale, to be sold at public auction in the city of New York, in the State of New York, after giving notice of the time & place of such sale by advertise-
16 ment, published not less than once a week for six months in one or more newspapers in each of the cities of New York & Davenport, & upon such sale to execute a deed in fee-simple, conveying title to the purchaser.

And such trustees on such sale were authorized to pay the expense of said sale, including a reasonable compensation for their services & enough to indemnify themselves against liability arising from their trust, & pay the residue pro rata to the holders of said bonds; first, to the payment of interest, then to payment of principal, & if any residue, to pay the same to the said debtor corporation.

17 9. That said deed of trust was duly recorded in the county of Scott, State of Iowa, December 24, A. D. 1872; Clinton Co., Iowa, June 12th, A. D. 1872; Jones County, Iowa, June 14, A. D. 1872; Clayton County, Iowa, June 3d, A. D. 1872; Delaware County, Io., February 7, A. D. 1872; Fayette County, Iowa, February 8, A. D. 1872; Howard County, Iowa, February 28th, A. D. 1872; Winneshick County, Iowa, February 29, A. D. 1872, and in the office of the secretary of state February 29, A. D. 1872.

10. That on the same day aforesaid, to wit, on the first day of July, A. D. 1871, the said Davenport & St. Paul Railroad Company made, executed, & delivered to the said John Edgar Thompson & Will-
18 iam Dennison a certain other deed of trust or mortgage by way of supplement, a copy of which is hereto annexed, marked Exhibit C.

11. That said supplemental mortgage amended article sixteen (16) of said first deed of trust, making it read as follows:

"Tenth. It is mutually agreed by & between the parties hereto that the words 'trustees' & 'trustee' respectively as used in these presents shall be construed to mean the persons who for the time being shall be charged with the execution of the trusts under these presents, whether such persons or person be the parties of the second part hereto, or

either of them, or successors or successor of the said parties of
19 the second part, or either of them, in said trust.

"And it is further mutually agreed that each of the said trustees shall be entitled to just compensation for any and all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust property, & that neither of the trustees shall be responsible for the default or misconduct of the other, or for the default or misconduct of any agent appointed in persuance of these presents, if such agent be selected with reasonable care.

"& it is further agreed that either of the said trustees may resign & be discharged from the performance of the trust created by these presents by giving notice in writing to the said party of the first part
20 and to his associate trustees, if there be such, of his intention to resign, to be served at least three months before the time limited therein for the taking effect of such resignation; and that the said trustees, or either of them, may be removed by the holders of the majority in interest of the whole amount of said bonds by an instrument in writing signed by such majority in interest.

"And it is further agreed that in case, at any time hereafter, the said trustees, or either of them, or any trustee hereinafter appointed, shall die, or resign, or be removed as herein provided or otherwise, or shall become incapa*pa*ble or unfit to act in said trust, a successor to such
21 trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding by an instrument in writing duly executed by such holders, & in case a vacancy shall at any time occur in said trust by death, resignation, or otherwise, the surviving or continuing trustee shall be vested with all the rights, powers, and authorities granted by these presents to the said parties of the second part.

"And that upon the resignation or removal of any trustee & the appointment of another trustee in his place, all the estate & interest, rights, powers, & authorities under this indenture of the trustee so resigning or being removed shall be transfer'ed to & become
22 vested in the new trust so appointed without any further assurence or conveyance; but the trustees so resigning or being removed shall, on request of the party of the first part, so of the new trustee who may be appointed, immediately execute a proper deed & deeds of conveyance to vest in such new trustee all the estate & interest, rights, powers, & authorities which were vested in or held by such resigning or removed trustee under or by virtue of these presents."

12. Said supplemental indenture further provides, "That no bond shall be valid or binding, or be benefitted, by the provisions hereof, unless the same shall be certified by the said trustees in the form aforesaid; & the said trustees shall not at any time certify or
23 allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, & tieing shall have been finished & completed, save as hereinafter provided."

13. Said supplemental indenture was duly signed, executed, & delivered by Geo. H. French, the president, & W. H. Price, the secretary, & attested by the seal of said Davenport & St. Paul Railroad Company, & the same was duly acknowledged by the said John Edgar Thompson & William Dennison, & duly recorded the sixteenth (16th) day of February thereafter in the office of the recorder, in Scott County,

Iowa, &, as your petitioner is informed, in the other counties through which said railroad is located.

14. And your petitioner further avers that said Davenport & St. Paul Railroad Company afterwards, to wit, on the first day of March, A. D. 1872, made, executed, & delivered a certain other supplem'tal deed of trust, a copy of which is hereto annexed, marked Exhibit D, and made a part hereof.

15. That among other things provided was this, that the said indenture, first mentioned herein, should be so amended that, in lieu of the ten' and sixteenth articles therein contained, the said sixteenth article shall be entirely omitted from said indenture, & said tenth articles, as therein contained, be amended, so that the form of the bond provided for in said first mortgage or deed of trust of, dated July 1st, 1871, be made to read as follows:

"The payment of this bond is secured by a mortgage or deed of trust bearing date July 1st, 1871, & by a deed supplemental to & amendatory thereof, bearing date March 1st, 1872, executed by said company on its road-bed, bridges, depot grounds, & buildings, & rolling stock, machinery, franchises, & all of its property of every kind, as also net incomes acquired & to be acquired, to John Edgar Thompson, of Pennsylvania, & William Dennison, of Ohio, trustees."

16. Said second supplemental indenture further provides that the *the* trustees' certificate, endorsed on said bonds, shall be amended & made to read as follows, to wit:

"The undersigned hereby certify that this bond is one of the series of bonds described in and secured by the within-mentioned mortgage or deed of trust dated July 1st, A. D. 1871, & the deed supplemental to & amendatory thereto, dated March 1st, A. D. 1872."

17. Said second supplemental indenture further provides, that "no bond as aforesaid shall be valid or binding, or be benefitted by the provisions hereof, unless the same shall be certified by the said trustees in the form aforesaid; and that said trustees shall allow no issue in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, & tieing shall have been finished & completed."

18. Other provisions are made in said second supplemental indenture, which may be seen by a reference to said Exhibit C.

19. Your petitioner further avers that three million in amount of bonds secured by the said mortgages herein mentioned were issued & delivered to the said trustees, & by said trustees certified as by said deed of trust required, & said railroad has been constructed as follows: Commencing at a point near Pine Hill cemetery, about four miles from the levee at Davenport; thence in a northerly direction to the town of Fayette, in the county of Fayette, a distance of about one hundred & twenty-four miles; also, what is known as the branch called the Maquokata Branch, commencing at Eldridge, in the county of Scott & State of Iowa, & running northerly to Maquoketa, in the county of Jackson & State aforesaid; & further, the grading is mostly completed from Fayette to the town of Cresco, county of Howard, State of Iowa, & that the bridging & tieing of the said road, the distance being about forty-five miles, has partly completed.

20. Your petitioner avers that said defendant corporation, on the first day of January, A. D. 1874, & ever since, have neglected to pay the interest on said three million four hundred & fifty thousand in amount of bonds, or any part thereof, & more than six months has elapsed since their failure to do so, & by reason thereof the whole of

the principal of said bonds has become due & payable, & said petitioner claims the right confer'ed on them of making the payment thereof by the sale of said mortgaged property.

21. Your petitioner avers that said defendants ought to pay what is due on said bonds for principal & interest, or otherwise release
30 their equity of redemption in the premises, but they refuse so to do.

22. Your petitioner is advised that about four hundred & fifty thousand dollars in amount of bonds were afterwards issued with a like certificate.

23. Your petitioner avers that the following parties: The Delaware R'y Construction Company, Western Car Company, Abraham Bibby, Andrew Mundy, Benjamin Burch; Burch, Lakin & Co.; Benjamin Burch, surviving partner of B. & H. M. Burch; Charles M. Lockwood, Richard Moore, H. S. Babcock, M. L. Rogers, First National Bank of Davenport, Hiram Price, David Stevens, Richard Elwood, John Horn-
31 by, Lewis Beal, C. S. Pect, Leroy Jackson, S. Denton & Co., Elizor Davis, J. H. Leach, E. Hoag, claim some judgment or other lien on said property, or some part of said mortgaged property, & some of them claim a lien subsequent & some prior to that of the plaintiff by virtue of said mortgage as amended, but your petitioner avers that his said mortgage lien is prior to any of them. He prays that said defendants, & each of them, may answer and fully disclose what judgment or lien on said premises on any part thereof .

24. Your petitioner avers that said judgments & liens are not such as can be enforced against the bondholders, because the call & re-
32 moval of the work done & materials furnished by said parties are impossible from the nature of the work done without the total destruction of the property annexed thereto, which is not included in or a part of the work done by the said plaintiffs in said judgments, & said judgments & sales were not rendered & made as required by the statutes of Iowa.

25. That said William Dennison is nominally a party defendant to some of said judgments, but was served only by publication, & was litigating the said judgments in the Iowa courts as is authorized by law.

26. That the said William Dennison is not now performing the duties of a trustee under said mortgage, having been removed.

33 27. That said judgment creditors may claim a right to redeem said mortgaged premises or a sale thereof.

28. That said railway construction, by an agreement (which is hereto annexed, marked Exhibit E), agreed with said bondholders that the subscriptions along the line of said road would grade, bridge, & tie the same ready for iron, & that the subscription was not sufficient. That said Davenport Railway Construction Company would do it, & said railway construction company is bound to pay all of said claims if paid.

34 29. That said railway construction company also agreed, by contract with said Davenport & St. Paul Railroad Company, dated July, A. D. 1872, & a copy of which is hereto annexed, to furnish equipments for the local traffic of said Davenport & St. Paul Railroad Company.

30. That said construction company, instead of furnishing said equipments as a part of the property of said Davenport & St. Paul Railroad Company .

31. The said Railway Construction Company & said Davenport & St. Paul Railroad Company leased ninety (90) cars of said West-

35 ern Car Company, at a rental of twenty dollars per car per month. & have paid out of the income of said railroad the sum of twenty-four thousand dollars & *after*wards, when it was the contract & duty of said construction company to furnish said cars & more cars as a part of the equipment of said road.

32. That said Davenport Railway Construction Company, on the day of , A. D. 1871, made a contract with said Davenport and St. Paul Railway Company to construct & build station-houses for said railroad, & they stipulated for an issue of stock, which gave them the control of said railroad *courparation*.

36 33. That the same persons own a majority of the stock, & control & govern the Davenport & St. Paul Railroad Company.

34. The Davenport Railway Construction Company & the Western Car Company knew the construction company were bound to furnish said cars, & said contract of lease instead of purchase was a fraud on the creditors of the Davenport & St. Paul Railroad Company, & said Construction Company is bound to pay for the cost price of said cars, but to refund & return *& return* to the plaintiff as trustee all the money paid for the use thereof.

37 That said Railway Construction Company has for more than two years past, without any contract or bargain, but of their own will & power, taken possession & used & operated the said Davenport & St. Paul Railroad, & has recover' the income thereof & appropriated it to its own use.

35. That it has neglected to pay the operatives it employed and the income for other purposes.

36. That it has totally neglected to apply the surplus income above operating expenses to the payment of the interest on said bonds, in violation of & with a full knowledge of the terms of said mortgage.

38 37. That the said construction company sold the said four hundred & fifty thousand in amount of bonds, & violated the conditions of said mortgage, with a full knowledge thereof.

38. That the said suit of Moses Dewitt Loomis in this court is a collusive suit of the said Railway & Construction Company; that it was brought by members of the construction company, or some of them, in the name of Loomis, who is a clerk of Andrew Carniegie, a member of said construction company.

39. That Loomis is not the bona fide owner of said $5,000 of bonds, but they belong to Carniegie or some member of the construction company, who purchased them & delivered them to Loomis to bring this suit.

39 40. That said Dennison voluntarily appeared to said bill, & assented to said French being appointed receiver, who was at the time of the said appointment president of the railroad company, & secretary of the construction company, & a stockholder therein, & sought & obtained said appointment as receiver, knowing he was not a proper person to be appointed.

41. That Dennison has been removed as a trustee by said bondholders, as they were authorized to do by said deed of trust, & he has no authority further to act as such.

42. The acts of said Dennison, & other things herein specified are contrary to equity, & tend to the plaintiff's injury.

40 To the end, therefore, that the said defendants may, if they can, show cause why your petitioners should not have the relief herein prayed, may full answer make to all the allegations of this bill, but not under oath, which is waived, your petitioner pray' that a

writ of subpœna issue from this court, directed to said defendants, to answer by a day therein named, that an account may be taken of what is doing & owing to the plaintiff as trustee for said bondholders under said deed of trust or mortgage for principal & interest. That said defendants may be decreed to pay what shall be found due & owing on said account, together with costs of foreclosure, by a short day to be appointed by the court for that purpose, your petitioners being ready & willing & offering at said appointed time to reconvey said mort-
41 gaged premises unto said defendants, as this court may direct. And in 'fault of such payment, that said defendants, & all persons claiming under them, be barred & foreclosed of equity of redemption, & said mortgaged property be sold by a special master to be appointed by this court, to satisfy said debt, interest & co'ts.

That said ninety cars may adjudged to be the property of said Davenport & St. Paul Railroad Company, & sold as a part of the property included in said mortgage.

That said trustees may be decreed to have a prior lien on said road-bed & ties, &c., in Delaware & Fayette Counties over said Delaware Railway Construction Company, said Sarah E. Burch, adminis-
42 tratrix of the H. M. Burch, & Burch, & *Burch*, Lakin & Co., or if they have any lien said construction company may be decreed to pay it.

That said construction company may be decreed to account for the income of said railroad company while in their possession.

That they may be adjudged to pay to the plaintiff the sums paid for rent of said cars & all orther income of said railroad misappropriated by them.

That they may be decreed to pay the cost of the suit of Loomis up to the time of the appointment of John E. Henry as receiver.

Your petitioner prays for such other & further relief as his case may require.

GRANT & SMITH,
Att'ys for Pl'ff.

JAMES GRANT,
Of Counsel.

43 (Endorsed:) In cir. c't of U. S., dist. of Iowa. Moses Dewitt Loomis vs. Davenport & St. Paul Railroad Company & others. Substituted bill. Filed May 14th, 1875. George B. Corkhill, clerk. Grant & Smith, att'ys for plff. J. Grant, of counsel.

43½ On the 14th day of July, 1875, said John Hornby, by his solicitors, filed in said clerk's office his answer to said bill, which said answer is in the words and figures following, to wit:

44 *Answer of John Hornby.*

UNITED STATES OF AMERICA,
District of Iowa:
In the circuit court. In equity.

LEWIS H. MEYER
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMPANY et al.

The answer of John Hornby, one of the defendants, to the bill of complaint of Lewis H. Meyer, complainant.

1. This defendant, reserving to himself all right of exception to the

said bill of complaint, for answer thereto saith that as to the death of John Edgar Thompson, as alleged, and the appointment of the said complainant as trustee in said mortgage in place of said Thompson, this defendant has no personal knowledge, but this defendant has been informed that said Thompson is dead, and believes the same to be true.

2. And this defendant, further answering, says he has been in-
45 formed and believes it to be true that the said indenture of mortgage, as set forth in the 4th, 5th, & 6th paragraphs of said bill was exe'uted, but this defendant, for greater certainty therein, craves leave to refer to the said mortgage and bonds when the same shall be produced.

And this defendant, further answering, admits that only 124 miles of the main line of said railroad has been graded, bridged, & tied as alleged, but as to the representations & pretensions of the said railroad company & trustees, and the issuance of four hundred and fifty thousand dollars in bonds without grading, bridging, & tieing any more than 124 miles of said road, in violation of the terms of said mortgage and set forth and averred in the 7th paragraph of said bill, this defendant has no personal knowledge, and not sufficient information to enable him to form any belief as to the truth thereof.

3. And this defendant, further answering, admits the truth
46 of the averments in the 8th & 9th paragraphs of said bill, so far as the same sets forth the true legal effect of said indenture, and as to the reading of the same in the various counties, defendant is informed and believes the same to be true.

4. And this defendant, further answering, says that he admits the execution of the supplemental deed of trust or mortgage, as alleged on the 10 paragraph of said bill, and also in 11th, 12th, & 13th paragraphs thereof, and also admits the execution of the further supplemental deed of trust as averred in the 14th, 15th, 16th, 17th, & 18th paragraphs of said bill, but for greater certainty therein, craves leave to refer to the same when they are produced.

5. And, further answering, this defendant admits the truth of the averments set forth in the 19th paragraph.

6th. And this defendant, further answering, says that as to
47 the truth of the facts averred in the 20th, 21st, & 22d paragraphs of said bill this defendant has no personal knowledge, but has been informed and believes the same to be true.

7. And this defendant, further answering, admits that he claims a judgment and mechanic's lien on said property, as hereafter more particularly set forth, but denies that it is subsequent to the lien claimed by said complainant under said mortgage.

8. And this defendant, further answering, denies that his said judgments & liens are not such as can be enforced against the bondholders for the reason set forth in the 24th paragraph of said bill, and denies that his said judgments and sales were not rendered and made as required by the statute of Iowa.

9th. And, further answering, this defendant says that as to the truth of the facts averred in the 26th, 27th, 28th, 29th, 30th, 31st, 32nd,
48 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, & 41st paragraphs of said bill, this defendant has no personal knowledge nor sufficient information to form a belief thereof, and leaves the complainant to make such proof thereof as he shall be advised is material.

10th. And this defendant, further answering, says that on the 22nd day of March, 1870, he entered into a written contract with the said Davenport and St. Paul Railroad Company, by which this defendant

agreed to furnish all the timber and lumber and piling and to do the bridging on the s'd Davenport & St. Paul Railroad from Eldridge Junction, in Scott County, Iowa, to Oxford Mills, in Jones County, Iowa, for the prices and on the terms stipulated in said written contract, a copy of which said written contract is hereto attached and made a part of this answer, as Exhibit A, to which further reference is hereby made.

49 That soon after the making of the said contract, and in the month of February, 1870, this defendant purchased and procured the lumber and piling necessary & required by said contract, and began the labor of putting the same in on the line of said railroad between said points, and continued the said work and labor thereon, as fast as the grading on said road was ready therefor, until the month of November, 1871, when the same was finished and the track of said road was made ready for the ties and iron to be laid thereon. That there was due to this defendant for s'd D. & St. Paul R. R. Co., paid for the materials furnished & the work & labor performed under said contract, at the close of the month of November, 1871, when the same was completed, a balance of two thousand three hundred & $\frac{70}{100}$ ($2,300.70) dollars, for which, under the laws of the State of Iowa, this defendant

50 was entitled and had a lien upon the erections, excavations, embankments, bridges, road-bed, right of way, and upon all land upon which the same are situated, between said points. That on the 5th day of November, 1874 this defendant caused to be instituted in the circuit court for Scott County, in the State of Iowa, a suit in his name and against the said Davenport and St. Paul Railroad Company to recover the said balance of $2,300.70, with the interest thereon, and thereafter, to wit, on the 25th day of November, A. D. 1874, this defendant recovered a judgment in said suit in said circuit court against the said Davenport and St. Paul Railroad Company for the sum of $2,408.85, with interest at six (6) per cent. per annum, which said judgment is still in full force and effect, and is wholly unpaid.

51 That the said materials were furnished and said labor performed by this defendant under said contract before the taking effect of the said deed of trust & mortgage set forth in complainant's bill, and before the negotiation of said bonds secured thereby, and the right and lien of this defendant under the laws of the State of Iowa is prior & superior to the lien of the said deed of trust or mortgage. And this defendant avers and says that his said lien for said claim of $2,408.85 is prior & superior in equity to the lien of said complainant's said deed of trust, and this defendant ought in equity to be prefer'ed therefor, & his said claim to be decreed to be first paid out of the proceeds from the sale of said property.

11th. And this defendant, further answering, says that on the 9th day of October, 1872, this defendant entered into a written contract

52 with the Davenport and St. Paul Railroad Company, one of the defendants herein, by which this defendant agreed to furnish and erect the bridging and furnish and drive the piling on that part of the line of the Davenport and St. Paul Railroad Company, from Pine Hill Cemetery, into and through the city of Davenport, being that part of the line of said road connecting with main line then completed, at or near Duck Creek, and extending thence to and along the bank of the Mississippi River at Warren street, in the said city of Davenport, and all being within this the county of Scott & State of Iowa, and which said extension is still incomplete, the ties and rails thereon not being laid up to this date.

That within ten days thereafter, to wit, on the 19th day of October, 1872, this defendant commenced the work of furnishing the said materials & doing the labor under said contract, and continued the
53 same up to the 1st day of November, 1873, at which time this defendant was by the said Davenport & St. Paul R. R. Co. ordered to quit the said work, and the said line of said road has remained ever since and now incomplete and in the condition in which it was then left by this defendant, and the ties & rails have never been laid thereon by the said company, nor is the grading and bridging entirely completed therefor so as to be ready for the laying of said ties and rails.

That on the said first day of November, 1873, there was due and owing to this defendant from the said Davenport & St. Paul R. R. Company for the said materials & work & labor, so as aforesaid furnished and performed under said contract in this said Scott County & State of Iowa the sum of ten thousand seven hundred and forty-seven & $\frac{30}{100}$ ($10,747.30) dollars over & above all payments & just credits
54 thereon.

That on the 28th day of November, A. D. 1873, this defendant caused to be filed in the office of the clerk of the district court of said Scott County & State of Iowa a just and true account of the said demand due him, after allowing all credits, and containing a correct description of the property, to be charged with the lien and verified by affidavit, and took all the requisite and necessary steps under the laws of the State of Iowa to complete and perfect his claim for a mechanic's lien, as hereinafter more particularly described, for said sum so due him, with the interest thereon.

That afterwards, to wit, on the 20th day of February, 1875, this defendant caused to be instituted a suit in the district court for said Scott County & State of Iowa in his name and against said Davenport & St. Paul Railroad Company, and making the said William
55 Dennison, the surviving trustee in said mortgage or deed of trust set forth in complainant's bill, a party defendant, to enforce said mechanic's lien for said sum due this defendant for said materials & work & labor, and as authorized and required by the laws of the State of Iowa.

That the said Davenport & St. Paul Railroad Company and the said William Dennison, surviving trustee as aforesaid, were duly served with notice of the said suit as required by the laws of said State of Iowa, and were subject to the jurisdiction of said court, which has full jurisdiction of the subject-matter of said suit, and thereafter, to wit, on the 5th day of May, 1875, and at the May term of said court, a decree was duly and legally rendered by said district court in said suit, adjudging
56 that this defendant do have and recover from the said Davenport & St. Paul Railroad Company the sum of $11,723.40, with interest and costs, and establishing in this defendant a mechanic's lien therefor from the said 19th day of October, A. D. 1872, a certified transcript of which said decree is hereto attached & made a part hereof as Exhibit B, to which further reference in this behalf is made.

That the said decree is still in full force & effect, and the amount there found due to this defendant is still due & unpaid, and the said decree is binding and conclusive upon the said complainant as well as upon the said Davenport & St. Paul R. R. Company, and the said complainant is estopped to dispute the same.

That the said mechanic's lien of this defendant for the said
57 materials and labor under said contract is prior and superior to the lien and claim of the said complainant upon the erections,

excavations, embankments, bridges, road-bed, and right of way, and upon all lands upon which the same may be situated on the line of the said Davenport & St. Paul Railroad Company as now located and staked out from Pine Hill Cemetery into and through the city of Davenport, in said Scott County and State of Iowa.

And this defendant prays that the same be so declared by the decree of this court.

And the said defendant, further answering, denies that the said complainant is entitled to the relief or any part thereof in the said complaint demanded, and this defendant prays the same advantage of his aforesaid answer as if he had pleaded or demanded to the said
58 bill of complaint, and this defendant prays leave to be dismissed with his reasonable costs & charges in this behalf most wrongfully sustained.

(Signed) JOHN HORNBY, *Def't.*

(S'g'd) JAMES T. LANE,
A. DAVISON,
Solicitor & of Counsel for Def't.

(Endorsed:) In circuit court. Moses DeWitt Loomis & others vs. The Davenport & St. Paul R. R. Co. & others. Answer of John Hornby. Filed July 14, '75. George B. Corkhill, cl'k. Davison & Lane, solicitors for def't.

STATE OF IOWA,
Scott County, ss:

Be it remembered that heretofore, to wit, at a term of the dis-
59 trict court of the State of Iowa, begun and held at Davenport in and for said county on the fourth Monday in April, A. D. 1875, was present Hon. Wm. F. Brannan, judge of the seventh judicial district of the State of Iowa, Harvey Leonard, sheriff of said county, and W. H. Gabbert, clerk of said court, and the following-entitled cause coming on to be heard on the 5th day of May, A. D. 1875, and still during said term of said court the following among other proceedings were had, therein, to wit:

EXHIBIT B.

JOHN HORNBY
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany, William Dennison, surviving trustee, The Davenport Railway Construction Company, The Abbot Iron Company, John
60 H. Boiler, Joseph Quinn, Michael Hogan, John Quinn, Joseph Boiler, S. W. Cochran, J. F. Powell, The First National Bank of Davenport, J. E. Powers, A. R. Jones, Hiram Price, A. R. Golden, Joseph Shields, and Francis W. French, defendants. } 13005.

And now this day this cause coming on for hearing, the plaintiff appearing by Mess. Davison and Lane, his attorneys, and the defendants not appearing, and having been three times called in open court, come not, make default herein. And it appearing to the satisfaction of the court from an inspection of the original notice and the

sheriff's return thereon and the records in this action, that the
61 defendants The Davenport and St. Paul Railroad Company, The Davenport Railway Construction, The First National Bank of Davenport, Francis W. French, Joseph Shields, Joseph Quinn, John Quinn, Joseph Boiler, S. W. Cochran, John H. Boiler, Hiram Price and A. R. Golden have each been duly and personally served with the original notice in this action as required by law, and from the proofs made and papers that the other defendants William Dennison, surviving trustee, The Abbott Iron Company, Michael Hagan, J. F. Powell, J. E. Powers, A. R. Jones, have each been duly served by publication in a newspaper with the original notice in this action as required by law, and that all of the defendants in this action are now in court and
62 subject to its jurisdiction for the purposes of this action, it is therefore ordered that all of the defendants be defaulted, which is accordingly done.

And it further appearing to the court, from the papers in the case and the proofs made, that the plaintiff performed the labor and furnished the materials at the times and in the manner set forth in his petition, under a contract with the Davenport and St. Paul Railroad Company, a railroad corporation created and existing under the laws of the State of Iowa, on the line of the said railroad company, located and staked out from Pine Hill Cemetery into and through the city of Davenport, in Scott County and State of Iowa, and that there is
63 due and coming to plaintiff therefor by said Davenport and St. Paul Railroad Company the sum of ten thousand and seven hundred and forty-seven $\frac{30}{100}$ ($10,747$\frac{30}{100}$) dollars, with interest thereon at six (6) per cent. from the first (1st) day of November, A. D. 1873, and the plaintiff is entitled to a mechanic's lien for said sum with interest and costs on the property described in and as claimed in his petition, from the nineteenth (19th) day of October, A. D. 1872, and has fully complied with the law entitling him to the relief prayed for in his petition. And the plaintiff having dismissed his claim for $2,000 damages, without prejudice. It is therefore adjudged and decreed by the court, that the plaintiff do have and recover of and from the de-
64 fendant, The Davenport and St. Paul Railroad Company, the sum of eleven thousand and seven hundred and twenty-three $\frac{19}{100}$ ($11,723$\frac{19}{100}$) dollars, with interest thereon from this date at six (6) per cent. per annum and his costs herein taxed at twenty-four (24) & $\frac{50}{100}$ dollars, and that execution issue therefor.

And it is further adjudged and decreed by the court, that the plaintiff have a mechanic's lien to secure said sum of $11,723$\frac{19}{100}$, with the interest and costs from the 19th day of October, A. D. 1872, on the real estate in the county of Scott and State of Iowa, over which the said Davenport and St. Paul Railroad Company has now or may hereafter acquire the right of way, or the title in fee for its track, both as
65 the main line of said railroad, as well as to the branch thereof running to Maquoketa, Iowa, and also all the tracks, rails, and ties thereon, or hereafter placed thereon, and on all bridging, piling, and other improvements of every kind and description, now or hereafter placed thereon, and also on all lands lying in said Scott County, which said Davenport and St. Paul Railroad Company may own, occupy or have any interest in, used in connection with its said railroad, or in running cars thereon, as well as all buildings and improvements thereon, and also upon the erections, excavations, embankments, bridges, roadbeds, right of way, and upon all land upon which the same may be situated, owned by the said railroad company, and particularly upon the

erections, excavations, embankments, bridges, road bed and
66 right of way, and upon all lands upon which the same may be situated, on the part of the road of the said Davenport and St. Paul Railroad Company, as now located and staked out from Pine Hill Cemetery into and through the city of Davenport, in said Scott County and State of Iowa, and as to the said property, erections, excavations, embankments, bridges, road bed, right of way, and the lands upon which the' are situated on the line of the said track from Pine Hill Cemetery into and through the city of Davenport, the said lien of plaintiff be, and the same is hereby, adjudged and decreed to be prior and superior to the rights, liens, and claims of the defendants and of each of them.

67 And it is further adjudged and decreed that the plaintiff have a special execution against the said property upon which the said mechanic's lien is herein established and a general execution against the said Davenport and St. Paul Railroad Company for any balance that may remain after the sale of the said property upon special execution.

W. H. Gabbert, clerk of the district court of the State of Iowa in and for said county, do hereby certify that the above and foregoing is a true and perfect transcript of the record entry of judgment in the above entitled cause as fully as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the court-house, in the city of Davenport,
68 and said court, this 9th day of July, A. D. 1877.

[SEAL.] W. H. GABBERT,
Clerk of said Court.

(Endorsed:) No. 13005. Transcript of record. In re. John Hornby vs. the Davenport & St. Paul Railroad Co.

Clerk's costs for transcript, $2.50.

Copy Exhibit A.

District court, Scott County.

I hereby agree to furnish all the timber and lumber and piling, and to do the bridging on the Davenport and St. Paul R. R., from Eldridge Junction to Oxford Mills, including all culverts, for the following prices,
69 to wit, thirty-two (32) dollars per thousand feet board measure and fifty cents per lineal foot for all filing driven. All of the work to be done at such times and places and in such manner as the chief engineer of said R. R. Co. may direct, and I further agree to take my pay in monthly estimates as made by said engineer and to allow the company to retain twenty per cent. of such estimates until the completion and acceptance of said work, when the said twenty per cent. shall be paid to me, the R. R. company agreeing to transport all material that has to be carried over five miles.

Davenport, March 22d, 1870.

(S'g'd) JOHN HORNBY.

On behalf of the Dav. and St. Paul R. R. Co. I accept of and agree to the above.

DAV. & ST. PAUL R. R. Co.,
Per H. PRICE, *Pres't.*

70 (Endorsed:) Copy contract of John Hornby with D. & St. P. R. R. Co. Answer of John Hornby, by leave. Filed by leave of court May 25, '77. E. R. Mason, clerk.

71 On the 14th day of August, 1875, said complainants filed their replication, said defendant's answer, which is in the words and figures following, to wit:

72 *Replication.*

In the circuit court of the United States for the district of Iowa.

MOSES DE WITT LOOMIS
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company and others.

Now comes Lewis H. Meyer and reserving all and all manner of advantage of exception to the manifold insufficiencies of the answer of John Hornby, in said cause, for replication thereunto, says:

That he will aver and prove his said bill to certain, true, and sufficient in law to be answered unto; that the said answer is uncertain, untrue, and insufficient in law to be replied unto by this repliant, without this, that any matter or thing in said answer contained material to answered unto, confessed or avoided, traversed or denied, is true.

All which things this complainant will aver and prove as this court shall direct, and prays as by his said bill he has already prayed.

GRANT & SMITH,
For Lewis H. Meyer.

73 (Endorsed:) Circuit court of the United States for the district of Iowa. Moses De Witt Loomis vs. The Davenport and St. Paul R. R. Co. and others. Replication to ans. of John Hornby. Filed Aug. 14, 1875. George B. Corkhill, clerk. Grant and Smith for L. H. Meyer.

74 On the 25th day of May, 1875, the said complainants filed an amendment to their bill, which is in the words and figures following, to wit:

75 *Amended petition as to the claim of John Hornby set up in his answer.*

Circuit court of the United States for the district of Iowa.

MOSES DE WITT LOOMIS, LEWIS H. MEYER, & Wm. Dennison
v.
THE DAVENPORT & ST. PAUL RAILROAD COMpany.

Now comes Lewis H. Meyer & John Dennison, trustees under said mortgage, and by leave of the court amend their petition as to the claim of John Hornby on his two judgments set up in his answer, and say:

1. That the Davenport & St. Paul Railroad Company was organized in the year 1869; that said corporation after its organization made a mortgage on its road & built about eight miles of road from Pine Hill

to Eldridge Junction, on the main line, and from Eldridge June,
76 tion a branch to Maquoketa of about thirty miles; that when it had completed so much the corporation became embarrassed, and its management was changed.

That on the 12 of May, 1871, Thomas A. Scott, Andrew Carnigie, B. E. Smith, Thomas L. Jewett, Wm. Dennison, Oakes Ames, John Duff, John H. Berryhill, & Hiram Price associated themselves together, intending to become a body corporate to build said road to Iowa, & called the Davenport Railway Construction Company; that on the 12 or 13 of May, 1871, before said articles of intended incorporation were recorded, and before said parties under the name of the Davenport Railway Construction Company became a corporation, & while yet a partnership composed of said parties above named and others, entered into a contract with the said Davenport & St. Paul Railroad Company to furnish all iron and material necessary for the building & furnishing of said railroad
78 from Eldridge Junction to St. Paul, said Railroad Company agree' to prepare, grade, bridge, & furnish ties for the same, and said parties, under the name of said construction company, were to receive in payment for their work 20,000 dollars per mile in bonds and a majority of the stock of said Davenport & St. Paul Railroad Company.

The bonds to be secured by a first mortgage on all the property & franchises of the said railroad company, & the bonds and proceeds of the same were to be paid to the construction co. in sums of 100,000$ as five miles of road should be finished, & all of the bonds to be issued (6,000,000 dollars) were to be executed by the Davenport & St. Paul R. R. Co., & to be placed with the Farmers' Loan & Trust Company, subject to delivery when certified by the presidents of the said road
78 & construction company, both of whom were members of said construction company. It was also by said contract agreed that the construction company might sell or dispose of the whole or any part of said bonds in advance of completion of any part of the road, and that the entire debt of the Dav. & St. Paul R'w' Co. did not exceed 50,000$, which said construction company was to pay or liquidate.

2. And afterwards, on the 29 of Feb., 1872, the said construction company agreed with the Davenport & St. Paul R. R. Co., *agreed* to furnish such rolling stock as should be necessary for local traffic, and the same was to be subject to said mortgage.

3. And afterwards, on the first day of July, 1871, the said Davenport & St. Paul R. R. Co., then under the control of the managers of said construction company, executed bonds and mortgage for six mil-
79 lion of dollars, which was a first mortgage or lien on all the present or thereafter to be acquired real and personal property and franchises of said Davenport & St. Paul Railroad Company, including track, road-bed, bridges, & superstructures, &c., and under and by virtue of said contract of 13 May, 1871, the said railroad company & said construction company issued & delivered to bona-fide purchasers for value, bonds to the amount of three million five hundred & eight thousand dollars; the corporation became insolvent, and the mortgage has been foreclosed and the property sold under proceedings in this cause, reserving to Hornby any rights of prior lien, if any he has.

4. And these plaintiffs further say that the said construction company, before it or the railroad company had sold any of said bonds, and after Hornby became a member of the construction company, on
80 the 28 of March, 1872, prepared a preamble and resolution, that—

"Whereas it was deemed advisable for the purpose of fully satisfying the purchasers of the first-mortgage bonds of the D. & St.

Paul R. R. Co., that the local subscriptions and grants to said company are and will be sufficient to prepare the whole of said line for the rails, as required by the terms of the contract with the construction co. for its construction:

"Resolved, That the company hereby guarantees that such subscriptions and grants shall be sufficient for said purpose, or that should they prove insufficient for said purpose, this company hereby undertakes and agrees to make good any deficiency, and to finish the preparation of the line for the rails out of its own resources."

And on the same day George H. French, B. E. Smith, Wm. Dennison, Thomas L. Jewett, Andrew Carnigie, & Oakes Ames, members of said construction company, wrote on said resolutions:

81 "The undersigned guarantee, as hereinafter submitted, the faithful performance by the Davenport Railway Construction Company of its obligations, noted in the foregoing resolution, each one to be responsible for his proportion of the amount necessary to finish the preparation of the road for the rails, as provided in said contract."

And on the 16 May, 1872, at a meeting of the stockholders of said Davenport Railway Construction Company, the following resolutions were passed:

"Whereas it is deemed advisable, for the purpose of further satisfying the purchasers of the first-mortgage bonds of the Davenport & St. Paul R. R. Co.: 1st. That the local subscriptions and grants to said company are and will be sufficient to prepare the whole of the line for the rails, as it is required by the terms of the contract of this company for

82 its construction. 2nd. That the net proceeds of the first-mortgage bonds of the said D. & S. Paul Co., issued at the rate of 20,000$ per mile, are and will be sufficient to build and equip the whole of the said railroad:

"Be it resolved, First. That this company hereby guarantees that such subscriptions and grants shall be sufficient for said purpose, and that should they prove insufficient this company hereby undertakes and agrees to make good any deficiency and to finish the preparation of the whole of said line for the rails from its own resources. Second. That this company hereby guarantees that the net proceeds of 20,000$ first-mortgage bonds per mile shall be sufficient to iron and equip the whole of said railroad, and should such proceeds prove insufficient this company hereby undertakes and agrees to make good any deficiency

83 and to finish the ironing and equipping the whole of said line out of its own resources."

At a meeting of the stockholders of the Davenport Railway Construction Company, held in New York on the 16 May, 1872, the above resolutions were unanimously passed.

The plaintiffs further alleges that the stockholders of both corporations approved of these and all other contracts herein referred to that related to the security of said bonded debt.

5. That plaintiffs further show that the said bonds were not sold until after July, 1872, and prior to the sale thereof the said railroad and construction company, with the approval of the stockholders of each company, enclosed to Sulzbach & Brothers, at Frankfort, the prospectus for the sale of said bonds, & said Sulzbach & Bro., as their agents, sold

84 them under said prospectus; and by said letter, approved by their respective stockholders, declared themselves jointly and severally responsible to the purchasers for the truth of the exact facts therein stated.

And by said prospectus, the truth of which was guaranteed, the said parties represented that the company's line of road, commencing at Davenport and terminating at St. Paul, was about 300 miles long; that in passing through Iowa & Minnesota it connected with the Winona & St. Paul R'road, with the Chicago, Iowa & Nebraska Railroad, the Dubuque & Sioux City, the McGregor & Sioux City R. R., the McGregor & Western R., the Northern Minnesota R. R., at St. Paul with all the railways terminating there, at Davenport with the Chicago, Rock Island & Pacific R. R., the Western Union, & the Peoria & Rock Island R'road.

That it had recently passed into the hands of what was generally termed the Pennsylvania party, and a contract for its completion
85 had been entered into as an extension of the Peoria and Rock Island.

That by the terms of the contract for construction, sufficient local subscriptions to the stock were to be obtained to prepare for the rails, so that the bonds were only required for the purchase of rails and equipments, and the bondholders would pos'ess the additional security imparted to a large share capital expended or to be expended. That one hundred miles were then completed & in operation from Davenport, and fifty miles more were ready for the rails, the work of grading, bridging, and tieing having been done. That the payment of the bonds were secured by a first mortgage of the company, dated July 1, 1871, *and* all the property and franchises of the company. The construction company & railroad company, & their respective stockholders, approved and consented to said prospectus & recited the said bonds had
86 then been sold to the said construction company.

The following material statements in said prospectus were false:

1. That one hundred miles of the line of said road, from Davenport to St. Paul, was completed and in operation from Davenport.

There were only 66 miles completed, from Duck Creek towards St. Paul.

2. That fifty miles more was graded, bridged & tied, ready for the iron. That by the terms of the contract for construction, local subscriptions sufficient to prepare the line for the rails were to be obtained. It was covenanted and agreed by the construction company that if they were sufficient, & if not the construction company were to do it.

Copies all the papers referred to are hereto annexed & made exhibits.

That the work by John Hornby, on which he claims to have filed a mechanic's lien claim, was between Pine Hill & Davenport, a distance of three miles, which was included in said mortgage, and to do
87 which work said Hornby contracted after he became a member of said construction company, which company while yet a partnership and before its articles were recorded, which was on the 17 of May, 1871, and of the liens of which mortgage the said Hornby had notice.

That said Hornby never completed the contract on which his judgment for a mechanic's lien was recovered; that he abandoned work about the time he brought his suit because he was not paid, and both the railway & construction companies had become insolvent; that the construction company had sold and received the proceeds of $3,508,000 of said bonds, which said member was, as he still is, a member thereof.

That neither the construction nor railroad company completed the said railroad; that they built the line from said Pine Hill to Fayette,
88 a distance of 115 miles, did not equip it, and when the work was

abandoned there were (unsatisfied) claims, right of way, grading, bridging, & (tieing, amounting) to near two hundred thousand dollars.

That said contract of the construction company of 12, 13 Mar., 1871, when it was a private partnership, was never abandoned or a new one made after the company became a corporation; that all subsequent agreements by the parties were in relation to said private partnership, and said John Hornby is in law bound thereby.

That said construction company and its members are bound by the terms of said contract and the additions thereto; that the construction company received the whole six millions of said bonds, and after having sold $3,508,000 & failed it cancelled the residue.

89 That said construction company and its members having agreed to receive bonds secured by a first mortgage lien on all the present and future acquisitions of said railroad, including the work done by Hornby, and having agreed with the holders of said bonds; that the said there were local subscriptions enough to prepare the road for the rails; and that if there was not that said construction company would prepare the road for the rails out of its own resources, and having received the bonds and proceeds of their sale, and having falsely and fraudulently represented to the holders that the very work on which Hornby claims a lien was completed and finished before Hornby entered upon the performance of his contract, the plaintiffs aver that said Hornby's claim for a prior lien against the holders & owners of said mortgage of which the plaintiffs are trustees is fraudulent and void in law, and to be postponed to the mortgage, and the plaintiffs pray that both and all

90 judgments of Hornby claiming a preferred lien to the said mortgage debt may be annulled and cancelled.

The plaintiff further alleges, at the date of the contract with the construction company and long before the contract was made with Hornby, which latter contract was after the plaintiff's mortgage was recorded, the said Davenport & St. Paul Railroad was completed from Duck Creek west of Pine Hill to Eldredge with its branch to Maquoketa. It had also completed and in use and operation its road from the Duck Creek Station westwardly to the Rock Island Railroad, at a point on the river bluff about ten miles west from Davenport, and was there connected with the Rock Island Railroad, & thus had a complete connection with the town of Davenport over the Rock Island Railroad.

91 Shortly after the contract with the construction company, and in the spring before the section or piece of road from Pine Hill to Davenport was projected or any work done thereon, but after the recording of the plaintiff's mortgage, the Rock Island Railroad lowered its grade on the bluff about six feet, and the Davenport & St. Paul Railroad refused to correspondingly lower its grade, and thereby severed its connection with the Rock Island road; up to this time no route from Pine Hill to Davenport had been adopted or determined, and after the severance of this connection the Davenport & St. Paul Company then, consulted and advised by the construction company, adopted the Pine Hill route, & for the first time commenced to build it after the plaintiff's mortgage was recorded.

And the plaintiff claims that the recording of said mortgage prior to the commencement of said work from Pine Hill to Davenport gives him a prior lien.

92 Whereupon he prays as he has already prayed, &c.

(S'g'd) GRANT,
Att'n'y for Pl'f.

(S'g'd) JAS. GRANT,
Sol.

(Endorsed:) Loomis, Meyer et als. vs. Davenport & St. Paul R. R. Co. et als. Amendment to petition as to the claim of John Hornby, set up in his answer. Filed by leave of court, May 25, 1877. E. R. Mason, clerk.

93 On the same day, to wit, May 25, 1877, there was filed in said clerk's office the following stipulations and agreements of parties, as follows, to wit:

94 *Stipulation.*

In U. S. circuit court, district of Iowa. May term, 1877.

MOSES DEWITT LOOMIS, LEWIS H. MEYER, trustee,
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company, JOHN HORNBY & others.

It is hereby agreed and stipulated by and between the complainants and John Hornby, one of the defendants in the above suit, that the answer of John Hornby setting up a claim for a mechanic's lien in the 11th division of his said answer shall be taken and treated as a cross-bill in all respects as fully as if it had been filed in this suit in form as a cross-bill under the equity rules, and that relief may be granted thereon as fully if said Hornby shall be held entitled to relief, and that said cross-bill shall be treated as denied by the replication now on file to said answer.

GRANT,
For Trustees.
JAMES T. LANE,
Solicitor for John Hornby.

95–97 (Endorsed:) Moses Dewitt Loomis, Lewis H. Meyer vs. The Davenport and St. Paul Railroad Company et al. Stipulation that the answer of John Hornby be treated as a cross-bill. 25 May. Filed May 25, 1877. E. R. Mason, clerk.

98 *Stipulation.*

UNITED STATES OF AMERICA,
District of Iowa, ss:

In circuit court, Oct. term, 1875.

MOSES DE WITT LOOMIS, LEWIS H. MEYER,
vs.
THE DAVENPORT AND ST. PAUL RAILWAY Co., and others.

John Hornby, one of the above defendants, has filed in this suit an answer, claiming a mechanic's lien on part of the line of said Davenport and St. Paul Railway prior and superior to the mortgage-lien of the above plaintiffs, and sets out a transcript of a judgment and decree of the circuit court of Scott County and State of Iowa, so adjudicating and establishing said lien to be prior to said mortgage-lien, but inasmuch as the said trustees in said mortgage who were made parties to said suit in

said Scott circuit court were only served with the original notice of the suit by publication and were defaulted, and therefore have the right
99 under the State law of Iowa to appear in said suit and have said default set aside and to plead to said action; in order to save costs and to speed the final issues in this case it is desirable for all parties that the question of the priority of said lien over said mortgage-lien of plaintiffs in this action be submitted to this court and be tried and finally disposed of in this action.

It is therefore agreed by and between the said John Hornby, one of the defendants herein, and the said Loomis and Meyers, plaintiffs herein, that the said plaintiffs may raise the question of such priority of said mechanic's lien, and contest the same as fully to all intents and purposes in this action as they could in the said Scott County circuit court, by appearing therein and setting aside said default, and the said Hornby for this purpose hereby waives the conclusiveness of his said judgment as a bar to the said plaintiffs in contesting the priority of said mechanic's lien over said mortgage-lien, and agrees to submit that
100 question to the decision of this court, notwithstanding said judgment and decree of said circuit court of Scott County, Iowa.

In all other respects except the question of the priority of said mechanic's lien over said mortgage lien the said judgment and decree are to be taken and held as conclusive.

(S'g'd) DAVISON AND LANE,
Att'ys for John Hornby.

(") GRANT & SMITH,
For Pl'ffs.

(Endorsed:) In U. S. cir. court. Moses De Witt Loomis and Lewis H. Meyer vs. The D. and St. Paul R. R. Co. and others. Stipulation between John Hornby and the plaintiffs. Filed Aug. 28, 1875. George B. Corkhill, clerk.

101 *Agreed statement of facts.*

In U. S. cir. c't, dist. of Ia. In equity.

MOSES DE WITT LOOMIS }
vs. }
THE DAVENPORT & ST. PAUL R. R. CO. ET ALS. }

It is hereby stipulated and agreed by and between the att'ys for the pl'ffs and the att'ys for John Hornby, one of the def'ts in the above-entitled suit, that the following facts are admitted to be true and are considered as fully established and in evedence without further proof on the trial of the issues in this suit between said pla'ntiffs and the said def't, John Hornby.

1st. The facts set forth and alleged on the 10 par. or division of the ans. of said Hornby, filed in this suit, are admitted to be true, but it is agreed that no notice or cla'm for a mechanic's lien for said work
102 was ever filed by said Hornby in the office of the clerk of the dist. c't as provided by the laws of I'a, and the right to a mechanic's lien, as well as its priority over the mortgage-lien of the pl'ffs, being conclusions of law are not admitted and are to be submitted to the judgment of this court, and no claim of right or law as stated in said paragraph is admitted.

2nd. The facts alleged and set forth in the 11th par. or division of the

answer of said Hornby, on file in this suit, are admitted to be true, except as to the priority of said mechanic's lien over said mortgage lien of pl'ffs, which is submitted to the court under the judgment between pl'ffs & said Hornby, heretofore filed in this suit, and no claim of right or law if made in said par. is admitted.

103 3. The D. & St. P. R. R. Co. was on the 20 day of May, 1868, organized under the laws of Ia., to construct and operate a R. R. commenced at Davenport, Ia., and thence to St. Paul in the State of Minn., & begun the work of constructing said R. R. at Pine Hill, about three miles from the city of Davenport, on the 15 day of Oct., 1869, and completed the same to Eldridge Junction, about 8 miles from Pine Hill, & thence a branch line to Maquoketa, about 32 miles distant, prior to May 12, 1871. The main line was extended and the road built for operation to Dixon, 12 miles from Eldridge Junc., on the 29 Feb., '72; to Wyoming, 41 miles, on the 8 March, 1872; to Monticello, 58 miles, May 8, '72; to Hopkington, 66 miles, Aug. 31, 1872; to Delhi, 74 miles, on Oct. 15, 1872, and to Fayette, Ia., 116.5 miles, on Dec. 1873, and

104 said R. R. has never been completed northwardly beyond Fayette.

4th. That at the time this suit was brought the said R. R. was only completed and operated between Fayette and Pine Hill, & that on the 10th day of Nov., 1876, said R. R. was completed, under the receiver of this court, from Pine Hill into the city of Davenport, at the levee on the bank of the Miss. River, & the order authorized him to do it, is to be admitted in evidence. The work on the road was entirely abandoned by the company before shortly after Mr. Hornby filed his lien claim.

5th. That on the 16th day of May, 1872, the mortgage now being foreclosed in this suit under which pl'ffs claim a lien was executed and was filed for record in Scott Co., Ia., on the 24 day of Dec., 1872; in

105 Clinton Co., Ia., on Jan. 9, '73; in Cedar Co., Ia., on Jan. 14, '73, and in the other co's along the line of said R. R. at a still later day, & the said John Hornby knew of the existence of said mortgage at the time he made his said contract under which he claims his said lien on the 10th division of his answer.

6th. That on the 29 day of May, 1872, & prior to his contract with the R. R. Co., & prior to his contract to do the work on which he claims a mechanic's lien, the said John Hornby became the owner by purchase of 9 shares of the capital stock of the Davenport R'y Construction Co., by purchase from J. H. Berryhill, & still owns the same, but has never been a director or officer in said co.; has never been present

106 at any of the meetings of the stockholders of said company, and has never in any manner, either by proxy or otherwise, authorized any person to represent him or his said shares of stock or to vote for him at any meeting of the stockholders of said co.

7th. It is further agreed that the printed exhibits hereto attached and marked Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, & N may be used in evidence without further proof of their execution, and the same manner as if they were originals whose execution was duly proved; subject, however, to any other objections for incompetency and irrelavancy by the said Hornby.

(Signed) JAMES GRANT,
For Trustees.

(Signed) DAVESON & SANE,
Att'y for Hornby.

107 (Endorsed:) Moses De Witt Loomis vs. The Davenport & St. Paul R. R. Co. & others. Agreed statement of facts as to John

Hornby's lien claim. Filed by leave of court May 25, '77. E. R. Mason, cl'k.

108 In United States circuit court district of Iowa.

LOOMIS MEYER ET AL.
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany et al. } No. 552. Eq.

In the matter of the claim of John Hornby for a mechanic's lein.

The following facts are admitted:

That when the Davenport & St. Paul Railroad was organized and work begun thereon, & prior to May 12, 1871, it was the design to build a contin'ous road from Davenport to St. Paul. That for lack of funds the road was begun at Duck Creek, two miles north of Davenport, and built as far as Eldridge Junction, on the main line about eight miles from Duck Creek, with a branch from that place to Maquoketa, a distance of thirty miles.

On May 12th, 1871, the railroad company made the contract
109 with the construction company, referred to in the pleadings, to iron and do other work to the road from Eldridge to St. Paul for twenty thousand dollars per mile and a majority of the stock of the corporation.

This contract was to build the road from Eldridge Junction to St. Paul, and not from Duck Creek to Davenport. At that time the railroad company had extended its road from Duck Creek westwardly about a mile to intersect the Rock Island Railroad on the bluff, made a temporary connection, & ran into Davenport from the point of intersection with the latter road.

This arrangement continued until sometime in the early part of 1872, when the Rock Island company lowered its grade at the bluff and severed the connection with the Davenport & St. Paul Railroad.

110 After the severance of connection with the Rock Island road the Davenport & St. Paul Railroad Company surveyed a line about a mile east of the Duck Creek terminus, and after the mortgage was recorded before the construction of said line into Davenport from Pine Hill through east Davenport to the river in Davenport.

By arrangement with the construction company the Davenport & St. Paul R. R. Company having no means to do this work the said construction company furnished the money to make what payments were made for building the part of the road from Pine Hill to Davenport, and it is for the work on this part of the road that Hornby claims his mechanic's lien.

The building of the road from Pine Hill into Davenport was postponed on account of the great expense, but a line was surveyed and the
111 intention and design, as well as the charter, was from the beginning to build and construct the road from Davenport to St. Paul, and the connection from Duck Creek with the Chicago, Rock Island and Pacific Railroad was only a temporary one and was not intended to be permanent, and the extension from Pine Hill into the said city is a part of the main line as it was originally surveyed and planned, although there was a change in part of the line as it was constructed under the contract with Hornby from the first survey, and all of that part of the

line on which Hornby did his work was changed and surveyed after the recording of the mortgage.

GRANT, *for Pl'ff.*
DAVISON & LANE,
Atto'ys for Hornby.

Loomis, Meyer, & al. vs. Davenport & St. Paul R. R. Co. & others. Agreed facts as to Hornby's case. Filed May 25, '77. E. K. Mason, clerk.

112 *Agreed statement of facts.*

In U. S. circuit court for the district of Iowa. In equity.

MOSES DE WITT LOOMIS AND L. M. MEYER
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company et als.

It is hereby stipulated and agreed by and between the attorneys for the plaintiffs, and the attorneys for John Hornby, one of the defendants in the above-entitled suit, that the following facts are admitted to be true, and are considered as fully established and in evidence without further proof on the trial of the issues in this suit between said plaintiffs and the said defendant John Hornby.

1st. The facts set forth and alleged in the 10th paragraph or division of the answer of said Hornby filed in this suit are admitted to be true, but it is agreed that no notice or claim for a mechanic's lien for
113 said work was ever filed by said Hornby in the office of the clerk of the district court, as provided by the laws of Iowa, and the right to a mechanic's lien, as well as its priority over the mortgage lien of the plaintiffs, beings conclusions of law are not admitted and are to be submitted to the judgment of this court, and no claim of right or law as stated in said paragraph is admitted.

2d. The facts alleged and set forth in the 11th paragraph or division of the answer of said Hornby on file in this suit are admitted to be true, except as to the priority of said mechanic's lien over said mortgage lien of plaintiffs, which is submitted to the court under the agreement between plaintiffs and said Hornby, heretofore filed in this suit, and no claim of right or law if made in said paragraph is admitted.

3d. The Davenport and St. Paul Railroad Company was on the 20th day of May, 1868, organized under the laws of Iowa, to construct and operate a railroad commencing at Davenport, Iowa, and thence
114 to St. Paul in the State of Minnesota, and began the work of constructing said railroad at Pine Hill, about three miles from the city of Davenport, on the 15th day of October, 1869, and completed the same to Eldridge Junction, about eight miles from Pine Hill, and thence a branch line to Maquoketa, about 32 miles distant, prior to May 12, 1871. The main line was extended and the road built for operation to Dixon, 12 miles from Eldridge Junction, on the 29th of Feb'y, 1872; to Wyoming, 41 miles, on the 8th day of March, 1872; to Monticello, Jones Co., 58 miles, on the 8th day of May, 1872; to Hopkinton, 66 miles, on the 31st day of August, 1872; to Delhi, 74 miles, on 15th day of October, 1872; and to Fayette, in Fayette Co., Iowa, 116.5 miles, on the 18th day

of December, 1873, and said railroad has never been completed northwardly beyond Fayette.

4th. That at the time this suit was brought the said railroad was only completed and operated between Fayette and Pine Hill, and that
115 on the 10th day of November, 1876, said railroad was completed under the receiver of this court from Pine Hill into the city of Davenport at the levee on the bank of the Mississippi River, and the order authorizing him to do it is to be admitted in evidence. The work on the road was entirely abandoned by the company shortly after Mr. Hornby filed his lien claim.

5th. That on the 16th day May, 1872, the mortgage now being foreclosed in this suit under which plaintiffs claim a lien was executed, and was filed for record in Scott County, Iowa, on the 24th day of December, 1872; in Clinton County, Iowa, on the 9th day of January, 1873; in Cedar County, Iowa, on the 14th day of January, 1873; and in the other counties along the line of said railroad at a still later day; and the said John Hornby knew of the existence of said mortgage at the time he made his said contract under which he claims his said lien in the 10th division of his answer.

6th. That on the 29th day of May, 1872, and prior to his con-
116 tract with the railroad company, and prior to his contract to do the work on which he claims a mechanic's lien, the said John Hornby became the owner by purchase of nine (9) shares of the capital stock of the Davenport Railway Construction Company by purchase from J. H. Berryhill, and still owns the same, but has never been a director or officer in said company, has never been present at any of the meetings of the stockholders of said company, and has never in any manner, either by proxy or otherwise, authorized any person to represent him or his said shares of stock, or to vote for him, at any meeting of the stockholders of said company.

7th. It is further agreed that the printed exhibits hereto attached, and marked Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N, may be used in evidence without further proof of this execution, in the same manner as if they were originals whose execution was duly proved, subject, however, to any other objections for incompetency and irrel-
117 evancy by the said Hornby.

(S'g'd) JAMES GRANT,
For Trustees.

(") DAVISON AND LANE,
Att'ys for Hornby.

(Endorsed:) Moses De Witt Loomis et al. vs. John Hornby et al. Agreed statement of facts.

118 EXHIBITS.

EXHIBIT A.

Articles of incorporation of the Davenport and St. Paul Railroad Company, together with amendments.

ARTICLE I. The name of this corporation shall be the Davenport and St. Paul Railroad Company.

ART. II. The elective officers of the corporation shall consist of a president, vice-president, and treasurer, and a board of directors, consisting of eleven members, and the president vice-president shall be ex officio

member, of said board, all of whom shall be elected on the 27th day of May, 1868, and shall hold their offices until the first annual election, and until their successors are elected and qualified. Seven members of the board shall constitute a quorum.

ART. III. The regular annual meetings of the stockholders for the election of officers shall be held at the office of the company, on
119 Wednesday after the first Monday in January in each year.

ART. IV. All of the elective officers after the first election shall be actual stockholders of the corporation.

ART. V. The office and principal place of business of the company shall be at Delhi, Delaware County, Iowa. The board of directors may at any time change the place of business by a two thirds vote, and designate the location thereof.

ART. VI. The general nature of the business of this corporation shall be the constructing and operating of a railroad commencing at Davenport, Iowa, thence via Canton, Cascade, Sand Spring, Hopkinton, Delhi, Delaware, Strawberry Point, Brush Creek, and Fayette, to St. Paul, Minnesota.

ART. VII. The capital stock of the corporation shall be three million of dollars, with the privilege of increasing it to five million, to be divided into shares of one hundred dollars each, to be subscribed
120 for and paid in as hereinafter provided.

ART. VIII. One per cent. of the subscription for stock shall be paid at the time of subscribing; the balance in installments, at the call of the directors, which shall not exceed four per cent., in thirty days after subscribing for the same, and five per cent. per month thereafter. The board of directors are authorized to take and accept of additional stock and subscription in money, real estate, or other property for the benefit of the company.

ART. IX. Any person owning one or more shares of stock, as provided by article seven hereof, upon which there remains no unpaid assessment or installment then due, shall be entitled at all meetings of the stockholders to one vote for each share of such stock.

ART. X. Certificates of stock shall be issued to all subscribers with an endorsement of the amount paid thereon. Such certificate shall
121 only be assignable on the books of the company under such regulations as the board may adopt. If any installment of stock should not be paid within sixty days after it is due, the board may at their discretion declare such stock and the payments made thereon forfeited.

ART. XI. The indebtedness or liability of the corporation shall in no case exceed two-thirds of the capital stock.

ART. XII. The private property of the stockholders shall not be held liable for the debts of the corporation beyond the amount of the unpaid installments on the stock owned by them.

ART. XIII. The time of the commencement of this corporation shall be on the 27th day of May, 1868, and continue for fifty years, with the privilege and right of renewal.

ART. XIV. These articles may be altered or amended at any annual meeting of the corporation; but no alteration or amendment shall
2 be made without previous notice thereof having been given by publication in some newspaper, as convenient as practical to the principal place of business of the company, for four consecutive weeks previous thereto, which last publication shall be at least thirty days prior to the day of said meeting. The articles of incorporation may also be amended by the unanimous vote of all the directors.

ART. XV. The board of directors shall employ a suitable person to act as secretary of said company, to keep a correct and full account of all its affairs, which shall at all times be subject to the inspection of any stockholder; said board are authorized to employ such other clerks, managers, and agents as they may deem essential to the good of the company, and the board may fill by appointment all vacancies in their body. The affairs of the company shall be conducted by the board of directors, and they are, as a board, hereby invested with all the
123 powers and authority necessary to carry out the objects of this corporation as limited by these articles. The board of directors may also adopt such by laws as they may deem to be for the best interests of the corporation, not inconsistent with these articles.

ART. XVI. The treasurer shall give bonds in a sum to be fixed by the board of directors, with security to be approved by them, conditioned for the faithful performance of his duties.

The board of directors may at any time require additional bonds to be given by said treasurer.

ART. XVII. All bonds for loans and certificates of stock shall be signed by the president and countersigned by the secretary.

ART. XVIII. At all meetings of the stockholders a majority of all the stock subscribed upon which there are no unpaid assessments must be represented, directly or by proxy, before business affecting the company can be transacted.

124 ART. XIX. Special meetings of the stockholders may be convened by the president by order of the board of directors, or whenever stockholders owning a majority of the stock of said company shall apply therefor by petition, in writing, directed to the president through the secretary. The business of special meetings shall be confined to the objects specified in the notice calling the same.

Amendments to the articles of incorporation.

ARTICLE I. Resolved by the board of directors of the Davenport and St. Paul Railroad Company, that the office and principal place of business of said company be changed from Delhi, Iowa, to Davenport Iowa.

ART. II. At a meeting of the board of directors of the Davenport and St. Paul Railroad Company, held at the office of the company, in Davenport, Iowa, on the 17th day of March, A. D. 1869, it was resolved by said board of directors, by a unanimous vote, "That article six
125 of the articles of incorporation of the Davenport and St. Paul Railroad Company be amended by striking out from said article six the words Canton, Sand Spring, and Brush Creek."

ART. III. At a meeting of the board of directors of the Davenport and St. Paul Railroad Company, held at the office of the company, in Davenport, Iowa, on the 17th day of March, A. D. 1869, it was resolved by said board of directors, by a unanimous vote, that the following be adopted as a substitute for article two of the articles of incorporation of the Davenport and St. Paul Railroad Company viz: The elective officers of the corporation shall consist of a president, vice-president, and treasurer, and board of directors consisting of thirteen members. The president and vice-president shall be ex-officio members of the board. Said directors shall be elected by the stockholders at their annual election, and shall hold their offices for one year, and until their successors are elected and qualified. The board of directors shall upon their election immediately proceed to elect a president, vice-president, and treas-

urer, who shall also hold their offices for the term of one year and until their successors are elected and qualified. Nine members of the board shall constitute a quorum.

126 ART. IV. At a meeting of the board of directors of the Davenport and St. Paul Railroad Co, held at the office of the company, in Davenport, Iowa, on the 17th day of March A. D. 1869, it was resolved by the said board of directors, by a unanimous vote, that article eight of the articles of incorporation of the Davenport and St. Paul Railroad Company be amended by adding thereto the following, viz: The board of directors are hereby authorized to take and accept of stock on other terms than those provided for in said article, and with such conditions as they may deem for the benefit of the company.

ART. V. At a meeting of the board of directors of the Davenport and St. Paul Railroad Company, held at the office of said company, in the city of Davenport, on the 10th day of September, 1869, the following amendments to the articles of incorporation of said company were unanimously adopted, to wit: "Resolved, That the articles of incorporation be so amended as to allow the president elected at this meeting to

127 hold his office until the annual election of the stockholders in January, 1872, and to discharge the duties of treasurer until the further order of the board of directors.

"Resolved, That the articles of incorporation be so amended as to allow the directors now elected to hold their offices until the annual meeting of the stockholders in January, A. D. 1872."

ARTICLE VI. At the annual meeting of the stockholders of the Davenport and St. Paul Railroad Co., held at the office of the company, in Davenport, Iowa, on the 4th day of January, 1871, Article VII of the articles of incorporation was amended by increasing the capital stock to nine millions of dollars.

ARTICLE X of said articles of incorporation was amended by striking out the word "shall" in the first line and substituting therefor the word "may."

ART. VII. At a meeting of the board of directors held at the office of the company at Davenport, on the 4th day of January, 1871, it was, by an unanimous vote,

128 Resolved, That article VI of the articles of incorporation be amended by striking out the words "Cascade," "Canton," and "Sand Springs."

Resolved, That the articles of association be amended so that the annual election of officers shall be held on the third Wednesday after the first Monday in January.

EXHIBIT B.

Mortgage.

D. & ST. PAUL R. R. CO.
vs.
JOHN EDGAR TOHMPSON ET AL.

This indenture, made on the first day of July, in the year of our Lord one thousand eight hundred and seventy one, between the Davenport and St. Paul Railroad Company, a corporation organized and formed by and under the laws of the State of Iowa, party of the first part, and John Edgar Thompson, of the city of Philadelphia, in the State of Pennsylvania, and William Dennison, of the city of Columbus, in the State of Ohio, parties of the second part, witnesseth:

That whereas the said party of the first part is authorized by
129 law to borrow all such sum or sums of money as shall be necessary for the construction, equipment, and maintenance of its road, and to convey all its corporate property, franchises, and effects by mortgages and deeds of trust, to secure payment of all such indebtedness as shall be contracted by it.

And whereas the said party of the first part has, by a resolution of its board of directors, duly authorized and empowered its president and secretary to execute and in its corporate name to issue bonds to be designated first-mortgage bonds, to be secured by a mortgage or deed of trust, in such form and with such covenants and conditions as the said president should deem most desirable for the best interests of the said corporation, for the purpose of securing the necessary means to iron and equip its said railroad, and a sinking fund of $40,000 per annum, to begin July 1st, 1875, the said bonds to be issued at a rate not to exceed the sum of $20,000 for each mile of the said railroad upon which the work of grading, bridging, and tieing shall have been completed, and to be issued from time to time as the said work shall progress.

130 And whereas the said resolution authorized the said president to designate the trustees, and John Edgar Thompson, of Pennsylvania, and William Dennison, of Ohio, having been designated by him as such trustees, to whom the said property of the said corporation should be conveyed to secure the payment of the principal and interest of the said bonds so to be issued, to incorporate in such mortgage or deed of trust as should be executed for the purpose aforesaid such covenants and conditions as should be deemed by him necessary and proper to promote and sustain public confidence in the security of the said bonds, and fix the rate of interest which the said bonds should bear.

And whereas the said president has determined to issue the said bonds in the said sums of $1,000 each, payable at the agency of the said railroad company in the city of New York, on the first day of July, in the year of our Lord one thousand nine hundred and eleven, bearing interest at the rate of seven per centum per annum, payable semi-
131 annually in New York, London, or Frankfort, at suitable agencies to be selected in said cities by said railroad company, and also make both the principal and interest of the said bonds payable in gold coin of the United States of America, of or equal to the present standard; and to have the said bonds duly prepared and deposited with the said parties of the second part, to be delivered over by them to the treasurer of the said company, on the order of the president, in an amount from time to time not to exceed the sum of $20,000 for each mile of the said road upon which the work of grading, bridging, and tieing shall have been completed, which said bonds are in the form following, that is to say:

FORM OF BOND.

$1.000.] Whole issue, $6,000,000. [No.

UNITED STATES OF AMERICA, STATE OF IOWA.

Seven per cent. first-mortgage sinking-fund bond.

The Davenport and St. Paul Railroad Company.

The Davenport and St. Paul Railroad Company, a corporation
132 existing under and by authority of the laws of the State of Iowa, promises to pay to John Edgar Thompson or bearer, on the first

day of July, one thousand nine hundred and eleven, in the city of New York, one thousand dollars in United States gold coin of or equal to the present standard, with interest thereon at 7 per cent. per annum, free of United States taxes, semi-annually, on the first day of January and July in like gold coin, upon presentation and surrender of the annexed coupons therefor, such interest to be paid either in New York, London, or Frankfort, at suitable agencies, to be hereafter named, in each of those cities, at the option of the holders, as specified in the coupons.

In case of default in payment of such interest when due, and continuance of such default for sixty days after demand, the principal of this bond will be subject to become due and payable upon the condition provided in the trust deed hereinafter mentioned. This bond is one of six thousand bonds, for one thousand dollars each, of like tenor and date, numbered from one to six thousand, inclusive, to be issued
133 on the said railroad at the rate of twenty thousand dollars per mile, as from time to time the road shall progress from the city of Davenport, in the State of Iowa, to the city of St. Paul, in the State of Minnesota, it being expressly understood that said issue of bonds shall not exceed the amount named per mile, and shall only be issued as the road shall progress.

The owner of this bond shall have the right at any time to convert it into the stock of the company at par.

The payment of this bond is secured by a mortgage or deed of trust of the company on its road-bed, depot grounds, and buildings, rolling-stock, machinery, franchises, and all its property of every kind, as also net incomes acquired and to be acquired, to John Edgar Thompson, of Pennsylvania, and William Denison, of Ohio, trustees, dated July the 1st, 1871, and duly recorded in all the counties through which the road is being constructed.

This bond is moreover secured by a sinking fund of 40,000 per
134 annum, to begin July 1st, 1875, to be set apart and increased annually for the redemption of the said bonds.

This bond is transferable by delivery, but it may be registered as to its ownership on a registry to be kept by the company.

After a registry of ownership certified hereon by the transfer agent of the company, no transfer shall be valid unless made on the books of the company, except if the last transfer be to bearer, transferability by delivery shall be restored, subject to successive registration and transfers to bearer as aforesaid, at the option of any lawful holder. This bond is further authenticated by the endorsement of said trustees hereon.

In witness whereof the said company has caused the foregoing to be attested on its behalf by the signature of its president and secretary, and its corporate seal to be affixed hereto, at Davenport, Iowa, this first day of July, A. D. 1871.

President.

Secretary.

135 FORM OF COUPON.

£7 5s. 10d. $35.00. Fl. 87.30.

The Davenport and St. Paul Railroad Company will pay to the bearer, as he may elect, in the city of New York, thirty-five dollars, United

States coin, or in London seven pounds five shillings tenpence sterling, or in Frankfort, O. M., eighty-seven florins and thirty kr'utzers, free of United States taxes, on the first day of January, 18 , being six months' interest on bond No. .

Secretary.

FORM TRUSTEES' CERTIFICATE.

The undersigned hereby certify that this bond is one of the series of bonds described in and secured by the within-mentioned deed of trust or mortgage, bearing date the first day of July, A. D. 1871.

Trustees.

And to each of said bonds there is to be affixed the requisite United States internal revenue stamp.

136 And whereas the board of directors of the Davenport and St. Paul Railroad Company have formally passed and adopted a resolution authorizing the president and secretary of said company to execute in its corporate name, and to affix thereto its corporate seal, a deed of trust to the said John Edgar Thompson and William Dennison to secure the payment of the principal and interest of the said bonds, and the same shall become due according to the tenure and effect thereof.

Now, therefore, this indenture witnesseth that the said The Davenport and St. Paul Railroad Company, for and in consideration of the premises, and of the sum of one dollar paid to it this day by the said parties of the second part, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of the principal and interest of the said bonds as the same shall become due and payable according to the tenor and effect thereof, and of the said coupons thereto severally annexed, hath granted, bargained, and sold, and by
137 these presents doth grant, bargain, and sell, convey, release, and confirm unto the said parties of the second part, and to their successor or successors, as trustees, all and singular the road, bridges, and superstructure of the said The Davenport and St. Paul Railroad, including all branches, side tracks, additions, turnouts, rights of way, depot grounds, coal lands, timber lands, and other lands now owned, and that hereafter may be acquired by said party of the first part, all depots, station-houses, grain-houses, engine-houses, car-houses, water-tanks, freight-houses, grain-elevators, wood-houses, coal-houses, car-shops, and machine-shop, and all other buildings whatsoever now erected or hereafter to be erected; also all kinds of machinery and tools now held and owned or hereafter to be acquired by said party of the first part for use in connection with the said railroad, including all locomotive tenders, cars, or other rolling stock or equipment, and all tools, implements, fuel, and materials of every kind used or procured for use in the constructing, operating, repairing, or replacing any part or
138 parcel of the said railroad, or any part of its appurtenances; also all property and franchises connected with or relating to the said railroad, or any part of its business in anywise whatsoever which are now held or may be hereafter in any way acquired by the said party of the first part, and also all rights, claims, and benefit in or to

any lease, contract, or agreement now made or which may be hereafter made by the said first party with any person or persons whomsoever.

Together with all and singular the tenements and appurtenances thereto belonging or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereto, and also all the estate, right, title, and interest whatsoever, as well at law as in equity, of the said party of the first part of, in, to, or out of the same, and every part and parcel thereof.

To have and to hold the premises above particularly described and set forth with the said parties of the second part, and to their
139 successor or successors, as trustee or trustees, in trust nevertheless for the uses and purposes hereinafter set forth and expressed, and upon the terms, covenants, agreements, and conditions following, that is to say:

First. The actual possession, occupation, management, and the use and control of the said railroad, and of all appurtenances thereof, shall be, remain, and lie with the said party of the first part without molestation or interference by or from the parties of the second part, or their successor or successors, in the said trust, until default be made in the payment of the principal of the said bonds, or some of them, or until default be made in respect to something herein required to be done by the party of the first part; and until such default be made as aforesaid the said party of the first part shall take and use all the earnings, incomes, rents, tolls, and issues of the premises and dispose of the same in any manner not inconsistent with the terms of this instrument.

140 Second. The bonds which shall be executed and issued by the said party of the first part under the provisions of this instrument and therein recited shall be delivered to said trustees to be certified by them as trustees, said certificate to be signed in the proper handwriting of at least one of the said trustees, and no bond shall be valid or binding or be benefitted by the provisions hereof unless the same shall be certified by the said trustees in form aforesaid, and the said trustees shall not at any time certify or allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, and tieing shall have been finished and completed.

And the said parties do hereby further mutually grant, covenant, promise, and agree, to and with each other, that although by reason of the terms and limitations in these presents expressed, it shall be unlawful for the trustees to certify any part of the issue of bonds herein
141 provided for, nevertheless upon deposit of the purchase-money thereof by the purchaser as hereinafter provided, the bonds so purchased shall be certified by the trustees and issued to such purchaser. Provided, always, that the purchase-money therefor shall be deposited to the credit of the trustees in some banking-house in the city of New York or Philadelphia, to be named by both the purchasers and trustees, which said purchase-money shall be used only in payment for iron and equipment of said railroad, at a rate not to exceed the sum of twenty thousand dollars for each mile of the said railroad upon which the work of grading, bridging, and tieing shall have been completed, and be paid from time to time as the said work shall progress upon written direction of the trustees.

Third. In case default shall be made in the payment of any of the interest coupons annexed to any of the foregoing bonds according to the tenor thereof, and if such default shall continue for the period of six months, it shall be lawful for the parties of the second part,

142 by duly authorized officer, agent, or attorney, upon the request of the person or persons owning and holding one-fourth in amount of such delinquent interest coupons made known to the said parties of the second part in writing, signed by the person or persons therein interested, or by his or their lawfully constituted agents or attorneys, to enter into and upon, all and singular, the premises thereby conveyed, and each and every part thereof, and to have, hold, and use the same under such superintendent, manager, or receiver or agent as the parties of the second part may select to conduct the business of the said railroad and its branches and to exercise the franchises pertaining thereto, and to make from time to time all repairs, replacements, additions, and improvements thereto as may seem judicious, and to collect all earnings, dues, freights, incomes, rents, tolls, issues and profits of the same, and of every part thereof, and after deducting the necessary expenses of operating the said railroad and of conducting the business thereof and of
143 all the said repairs, replacements, additions and improvements, and of all taxes, assessments, or liens upon the said premises, or any part thereof, as well as a just compensation for their or his own services, to apply the moneys arising as aforesaid to the payment of interest coupons in the order in which they shall respectively become due, and after paying all such past due coupons and all installments or balances thereof to apply the remainder of said moneys to the satisfaction of the principal of the aforesaid bonds which may be due and unpaid, rateably, and without discrimination or preference.

Fourth. In case default shall be made as aforesaid and shall continue as aforesaid, it shall also be lawful for the said parties of the second part, after entry as aforesaid, or without entry, on the request of the person or persons owning and holding the majority in amount of the said delinquency expressed in writing to the said parties of the second part, to sell and dispose of the premises hereby conveyed at public
144 auction, in the city of New York, or at such place as the parties of the second part may designate, having first given notice of the time and place of such sale by advertisement, published not less than once a week for six months, in one or more newspapers published in each of the cities of New York and Davenport, and to adjourn the said sale from time to time by announcement at the time and place advertised without other notice, and make and deliver unto the purchaser or purchasers thereof good and sufficient deed or deeds, conveyance, or other assurance in the law to vest in the said purchaser or purchasers of the said premises an absolute estate in the said premises in fee simple, which sale so made as aforesaid shall be a perpetual lien both in law and in equity against the said party of the first part and all and every other person or persons claiming or to claim the same by, from, through, or under the said party of the first part, and after deducting from the proceeds of such sale just allowance for all the expenses thereof, including a reasonable amount for attorneys' fees and other necessary expenses incurred by the said trustees in managing the business of the said
145 railroad while in possession or in arranging the sale thereof, to apply the remaining proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall have previously become due, and the interest which shall have accrued on the said principal and be unpaid, without discrimination or preference, but rateably to the aggregate amount of such unpaid principal and such accrued and unpaid interest, in United State' gold coin at par, and if after satisfaction thereof as aforesaid a surplus

of the said proceeds shall remain, to pay the same over to the party of the first part.

Fifth. At any sale of the aforesaid property, or any part thereof, whether made under the power herein granted or by judicial authority, the parties of the second part may bid for and purchase the property so sold or any part thereof for and on behalf of the holders of the bonds hereby secured and then outstanding, in proportion to the respective interests of such bondholders.

146 In case default shall be made in payment of any half-year's interest of any of the aforesaid bonds according to the tenor and effect of the coupons thereto annexed, and if such default shall continue for the period of six months after such coupons shall have become due, and payment thereof shall have been demanded, then the principal of all the bonds secured hereby, if a majority in interest of all the holders of the said bonds shall so direct, in writing, before the interest so in arrears shall have been paid, shall be declared by the parties of the second part to be immediately due and payable, and thereupon the same shall become due and payable, anything contained in the said bond or herein to the contrary notwithstanding.

Seventh. The said party of the first part shall, from time to time, as often as thereunto requested by the said trustees or their successor or successors in said trust, execute, acknowledge, and deliver all such

147 further deeds, conveyances, and acceptances as shall be necessary for the better assuring unto the trustees aforesaid, or their successors, the said railroad and equipments, rights and equities hereinbefore mentioned, or intended so to be, and all other property and things whatsoever which may be hereafter acquired, for use in connection with the same or any part thereof, and all franchises now held or hereafter to be acquired, including the franchise to be a corporation.

Eighth. The said trustees or their successors shall have power, in their discretion, upon the written request of the party of the first part, to convey, by way of release or otherwise, to the person or persons designated by the said party of the first part, and lands acquired or held for the purpose of stations, depots, shops or other buildings, any land or property which, in the judgment of the said trustees for the time being, shall not be necessary for use in connection with the said railroad, or which may have been held for a supply of fuel, gravel, or other

148 material, and also to convey, as aforesaid, on like request, any land not occupied by the track which may become disused by reason of a change of the location of any station-house, depot, shop or building connected with the said railroad; and such lands occupied by the track and adjacent to such station-house, depot, shop, or other building, as the said party of the first part may deem it expedient to disuse or abandon by means of such change, and to consent to any such change and to such other changes in the location of the track or depots or other buildings as in their judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect, but any proceeds from such sales are to be placed at the disposal of the trustees, to be by them applied to the sinking fund; and any land which may be acquired for permanent use in substitution for any so released shall be conveyed to the said trustees upon the trusts of these presents, and the said trustees for the time being shall also

149 have full power to allow the said party of the first part, from time to time, to dispose of according to their discretion such portions of the equipment, machinery and implements, at any time held or acquired for the use of the said railroad, as may have become unfit for use,

replacing the same by new, which shall be conveyed to the said trustees, or otherwise made subject to the operation of these presents.

Ninth. It is hereby declared and agreed that it shall be the duty of the trustees aforesaid and their successors to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to take the appropriate proceedings in equity or at law to enforce the rights of the holders of the said bonds under these presents, upon the written request hereinbefore mentioned, when the person or persons making the same shall furnish to the said trustees a proper indemnification against the cost and expenses to be incurred by them therein.

Tenth. "It is mutually agreed by and between the parties
150 hereto that the words 'trustees' or 'trustee,' respectively, as used in these presents, shall be construed to mean the persons or person who, for the time being, shall be charged with the execution of the trusts under these presents, whether such persons or person be the parties of the second part hereto, or either of them, or successors or successor of the said parties of the second part, or either of them, in said trust.

"And it is further mutually agreed, that each of the said trustees shall be entitled to just compensation for any and all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust-property, and that neither of the said trustees shall be responsible for the default or misconduct of the other, or for the default or misconduct of any agent appointed in pursuance of these presents, if such agent be selected with reasonable care.

"And it is hereby further agreed that either of the said trustees may resign and be discharged from the performance of the trust created by these presents, by giving notice in writing to the said
151 party of the first part, and to his associate trustee, if there be such, of his intention so to resign, to be served at least three months before the time limited therein for the taking effect of such resignation; and that the said trustees, or either of them, may be removed by the holders of a majority in interest of the whole amount of said bonds, by an instrument in writing signed by such majority in interest.

"And it is further agreed that in case, at any time hereafter, the said trustees or either of them or any trustee hereafter appointed shall die or resign or be removed as herein provided or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding, by an instrument in writing duly executed by such holders; that in case a vacancy shall at any time occur in said trust by death, resignation, or otherwise, the surviving or con-
152 tinuing trustee shall during such vacancy be vested with all the rights, powers, and authorities granted by these presents to the said parties of the second part; that any act or thing which is herein made the duty of the said trustees to do, as distinguished from matters in their discretion, may be done by one of the said trustees as validly as by both in case of the inability, refusal, or unreasonable delay of either of them to join in doing the same; and that upon the resignation or removal of any trustee and the appointment of another trustee in his place, all the estate and interest, rights, powers, and authorities under this indenture of the trustee so resigning or being removed shall be transferred to and become vested in the new trustee so appointed, without any further assurance or conveyance, but the trustee so resigning or

being removed shall, on the written request of the first part' or of the new trustee who may be appointed, immediately execute a proper deed or deeds of conveyance to vest in such new trustee all the estate and interest, rights, powers, and authorities which were vested in or
153 held by such resigning or removed trustees under and by virtue of these presents; provided, nevertheless, and it is hereby agreed and declared, that in case it shall at any time hereafter prove impracticable to appoint a trustee hereunder, in the manner hereinbefore provided, and that a vacancy in said trust shall remain unfilled for the space of sixty days, application on behalf of all the holders of the bonds secured hereby may be made on reasonable notice in writing to the said party of the first part and to the surviving and continuing trustee, if there be such, by holders of said bonds to the aggregate amount of one hundred thousand dollars, to any court of competent jurisdiction, for the appointment of a new trustee or new trustees."

Eleventh. The said party of the first part, in consideration of the premises and of the said sum of one dollar duly paid as aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors in the said trust,
154 to have an office or agency in the city of New York for the payment of the principal, and an agency in each of the cities of New York, London, and Frankfort-on-the-Main for the payment of interest of the bonds hereby secured as the same shall respectively become due and payable.

Twelfth. The said party of the first part, for the considerations aforesaid, hereby further covenants and agrees to and with the said parties of the second part and their successor or successors, that the proceeds of the said bonds shall at all times be faithfully applied to the uses and purposes hereinbefore specified, and to no other use or purpose whatsoever.

Thirteenth. The said party of the first part agrees and covenants with parties of the second part and their successors that it will create a sinking fund for the redemption of the full amount of the bonds hereby secured, and will therefor set apart and deposit with a sinking fund commissioner or commissioners to be appointed by the party of
155 the first part, on the first day of July, 1875, the sum of 40,000, and will on the first day of July of each and every year thereafter deposit with said commissioner or commissioners the like sum of 40,000, such annual deposits to be continually invested and compounded with the interest thereof for the increase of the said sinking fund until the maturity of said bonds; such sinking fund moneys shall from time to time under the orders of the party of the first part be invested in the purchase of the bonds hereby secured as long as the same can be purchased under or at par, and when this cannot be done, then in such other bonds as shall be designated by the party of the first part with the consent of the said party of the second part, and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added and paid into such sinking fund and compounded therein continually and reinvested in like manner with the other monies of said fund, and the same shall be
156 used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railroad company, party of the first part, shall have entire control of the said sinking fund, and every person in charge of or connected with the same, and direct how it shall be kept, and the manner of keeping the accounts thereof, and shall

require ample security to be given to them by any person in charge of its moneys or its securities or bonds for its safe-keeping. Provided that no securities shall be purchased for said fund other than the bonds secured hereby without the consent of the parties of the second part as aforesaid.

Fourteenth. And the said party of the first part, for the consideration aforesaid, hereby further covenants and agrees to and with the said parties of the second part that it, the said party of the first part, shall and will at all times hereafter observe, perform, and keep all and
157 every the conditions, covenants, and provisions herein contained to be the said party of the first part performed and kept.

Fifteenth. If the party of the first part shall well and truly pay the sums of money herein required to be paid by the said party, and all interests thereon, and at the times and in the manner hereinbefore specified, and shall well truly keep and perform all the things herein required to be kept and performed by the said party of the first part, according to the true intent and meaning of these presents, then and in that case the estate, right, title, and interest of the said parties of the second part, and of their successors in the trust hereby created, shall cease, determine, and become absolutely void; otherwise to be and remain in full force and virtue.

Sixteenth. In all cases in which the trustees may be required to act, they are hereby invested with full powers of arbitrament and of compromise, and of appointing agents and attorneys to act in their behalf.

158 In testimony whereof the said party of the first part has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary, and the parties of the second part, to testify their acceptance of the said trusts, have hereunto subscribed their names on the day and year first hereinbefore written.

DAVENPORT AND ST. PAUL RAILROAD COMPANY,
[SEAL.] By GEO. H. FRENCH,
President.
Attest:
[SEAL.] W. H. PRICE,
Secretary D. and St. P. R. R. Co.
J. EDGAR THOMSON,
Trustee. [SEAL.]
W. DENNISON,
Trustee. [SEAL.]

Signed, sealed, and delivered in presence of—
LEWIS SANDERS.
GARDINER F. MCCANDLESS.

159 UNITED STATES OF AMERICA,
City of New York, State of New York, ss:

On this sixteenth day of May, A. D. 1872, before me, a notary public, duly commissioned by the governor of the State of New York, and duly qualified to administer oaths and take acknowledgment of deeds for the county of New York, personally appeared George H. French and W. H. Price, to me known, and known to me to be the identical president and secretary of the Davenport and St. Paul Railroad Company, and known to me to be the persons who executed the foregoing instrument, who, being by me duly and severally sworn, said that they reside in the city of Davenport, State of Iowa; that they were respectively the president

and secretary of the said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said company; and that they signed their names thereto
160 by the like order as president and secretary respectively of said company; and the said president and secretary thereupon severally acknowledged the execution of the foregoing instrument as the voluntary act and deed of said company. And on the same day, before me, the said notary public, personally appeared William Dennison, to me known, and known to me to be the identical person and trustee described in and who executed the foregoing instrument, who duly acknowledged, as such trustees, that he executed the same as his voluntary act and deed. And on the fourteenth day of May, A. D. 1872, before me, the said notary public, personally appeared J. Edgar Thompson, to me known, and known to me to be the identical person and trustee described in and who executed the foregoing instrument, who duly acknowledged, as such trustee, that he executed the same as his voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my seal.

[SEAL.] LEWIS SANDERS,
Notary Public New York County.

161 EXHIBIT C.

Articles of incorporation of the Davenport Railway Construction Company.

We, Thomas A. Scott, Andrew Carnegie, B. E. Smith, Thomas L. Jewitt, William Dennison, J. Edgar Thompson, Oakes Ames, John Duff, John H. Berryhill, and Hiram Price, together with such other persons as may hereafter become associated with us, do hereby associate ourselves together as a body corporate in law, to be known as the Davenport Railway Construction Company, and claim for such incorporation all the rights, powers, and privileges and immunities granted and conferred upon like incorporations by chapter 52, article 1, of the revised code of the laws of the State of Iowa, adopted in the year 1860, and we adopt the following articles of incorporation:

ARTICLE 1. The name of the incorporation shall be that hereinbefore mentioned. It shall begin on the 12th day of May, 1871, and continue for ten years, unless sooner dissolved. The principal office or place of business shall be at Davenport, in the county of Scott and State
162 of Iowa, and the general nature of the business to be transacted by it is furnishing material for and the building, making, and equipping of railroads in the State of Iowa and all proper extensions of the same in adjoining States.

ART. 2. The corporation shall be vested with full power to make contracts with individuals or with other corporations for the performance of labor upon, and the furnishing of materials to, railroads; may buy, sell, and convey lands; receive, purchase, hold, sell, and exchange such bonds, stocks, and other securities as may, in the judgment of the company, be needful for the purpose of carrying into effect the object of this incorporation; may have and use a common seal, which it may alter or change at pleasure; may sue and be sued, and enter into contracts in its corporate name; and may from time to time make all by-laws and regulations as may be deemed expedient, and not inconsistent with the laws of this State and this article.

ART. 3. The capital stock of the incorporation shall be one mil-
163 lion five hundred thousand ($1,500,000) dollars, divided into shares of one hundred dollars each, but the capital stock may be increased from time to time by the approval in writing of holders of two-thirds of the stock, or by a vote of the board of directors.

ART. 4. The amount of the indebtedness of the corporation shall at no time be greater than two-thirds of the capital stock.

ART. 5. The private property of the individual members is hereby declared to be exempt from liability for the debts or other liabilities of this corporation.

ART. 6. The business of this corporation shall be managed by a board of nine directors, who shall be shareholders. Benjamin E. Smith, Oakes Ames, William Dennison, J. Edgar Thompson, Andrew Carnegie, John Duff, John H. Berryhill, Thomas A. Scott, and Thomas L. Jewett shall act as a board of directors until their successors are elected and qualified to act after the year 1871. The directors shall be elected at the annual meeting of the stockholders, to be held at the principal office
164 of the company on the second of May. Notice of such annual meeting shall be published in at least one newspaper in the county in which the principal office is situated for three weeks before such meeting.

The directors shall act as inspectors of the election, and any two of them may so act in the absence of the others; every stockholder may attend all annual meetings in person or by proxy, and cast one vote for every share of stock held by him for at least thirty days previous to the election.

ART. 7. Until their successors are duly elected by the board of directors, the following persons shall be officers of the company: President, Benjamin E. Smith; secretary, George H. French; treasurer, Andrew Carnegie; executive committee, Benjamin E. Smith, Oakes Ames, Thomas A. Scott, William Dennison, and Andrew Carnegie.

ART. 8. The board of directors shall elect one of their own members president; the said board shall also appoint a secretary, treasurer, and such other officers and agents as may by them deemed neces-
165 sary. Such officers may be at any time removed by a vote of the majority of the directors of the board; shall also have power to appoint of their own members an executive committee, which shall perform such duties as may be prescribed in the by-laws, or by the board; and the board of directors or the executive committee may hold meetings for business in the city of New York, or elsewhere away from the principal office, whenever they may deem it expedient; and of all such meetings a record shall be kept of the proceedings, and entered among the records in the principal office.

ART. 9. The shares of stock in this corporation are declared to be personal property, and are transferable only on the books of the corporation by the shareholder, or his attorney.

ART. 10. The subscriptions to the capital stock of this corporation shall be payable as called for the board of directors, in accordance with the conditions and terms of the subscription. In case any shareholder shall make default in the payment of any call for the term of sixty (60) days after the same shall be payable, the board may
166 prosecute the same, or may by resolution forfeit the share of such defaulting subscriber on which such default is made, together with all payments made thereon.

ART. 11. These articles may be amended at any time by the written

approval of a majority of the stockholders in interest, and also by the unanimous vote of the board of directors.

ART. 12. All the officers of this corporation shall hold their office until their successors are properly elected or appointed and qualified to succeed them. To the end that these articles of incorporation may be recorded as required by law, and become operative and effective, we corporators hereinbefore named have hereunto set our hands this 12th day of May, A. D. 1871.

W. DENNISON.
OAKES AMES.
B. E. SMITH.
OAKES A. AMES,
By OAKES AMES,
His Attorney.
H. PRICE.

Filed for record the 17th day of May, 1871, at 11.15 a. m.
F. M. SUITER,
Recorder.

167 EXHIBIT D.

Article of agreement made and entered into this 12th day of May, A. D. 1871, between the Davenport Railway Construction Company, a corporation organized under the laws of the State of Iowa of the first part, and the Davenport and St. Paul Railroad Company, a corporation organized and existing by the same authority of the second part, witnesseth:

That the said construction company, for and in consideration of the covenants and stipulations hereinafter contained, to be performed by the said railroad company, will furnish all the iron and material necessary for the building and furnishing of the Davenport and St. Paul Railroad, with its stations, side-tracks, shops, depots, turn-tables, and water tanks, from Eldridge Junction, in Scott County, Iowa, to St. Paul, in the State of Minnesota, or such intermediate point as connections of a satisfactory character can be made, to form a line
168 to St. Paul, the iron spikes and all other material to be of as good quality as that now in said railroad from Davenport to Maquoketa, and to do all these things as fast as the road-bed is properly graded, bridged, and tied, with right of way and depot grounds, with stock at par.

The said railroad company agrees to prepare and finish the grading and bridging of said line of road, and furnish the ties for the same, with right of way and depot grounds, the cost of which is to be represented by stock at par, and to pay the said construction company twenty thousand ($20,000) dollars per mile in the bonds of said railroad company, which bonds shall be twenty (20) year seven per cent. gold bonds free of Government tax, with the interest payable semi-annually in the city of New York on the first days of January and July.

Said boards to be secured by a first mortgage on all the property and franchises of said railroad company, and in further consideration also agree to issue and deliver to said Construction
169 company five (5) per cent. over and above one-half of all the stock that has been or may be issued by said Davenport and St. Paul Railroad Company, so that said construction company will have a con-

trolling interest in said stock, the bonds of said railroad company shall be issued as follows, to wit: When five (5) miles of said road are ironed and finished with the proper buildings, stations, turn-tables, side tracks, water-tanks, &c., then $100,000 of the bonds of said railroad company properly executed shall be delivered to the said construction company and so on from time to time as fast and as often as another five miles shall be so finished, so that the said construction company shall receive $100,000 of said bonds for every five miles of said railroad so finished and ready for operation as aforesaid.

All the bonds of said company amounting to six millions ($6,000,000) shall be duly executed by said Davenport and St. Paul Railroad Company and be placed in escrow or trust with the Farmers' Loan and
170 Trust Company in the city of New York, subject to delivery to said construction company, under the terms and conditions of this contract when certified by the president of the railroad company and the president of the construction company.

And it is further understood and agreed that if the construction company can sell or dispose of the whole or part of said bonds in advance of the actual completion of any of the sections of said road, said construction company may sell and dispose of the same, but all proceeds derived therefrom shall be paid into the said trust company and be held by it at current deposit rates of interest, and said proceeds shall only be paid out rateably from time to time as each five miles of road are ready for business as hereinbefore provided for the delivery of bonds; that is, the proceeds of each $100,000 of bonds and deposit interest thereon shall be paid over for each five miles of road completed, and if it should occur that all of said miles of road representing the whole of said six (6) millions of bonds under this contract should not be constructed, then
171 all proceeds remaining with said trust company whether in bonds or cash shall revert to the Davenport and St. Paul Railroad Company.

It is understood that the entire indebtedness of the Davenport and St. Paul Railroad Company does not exceed $50,000, and the said company agrees that so much of the first payment of said construction company as may be required shall be applied to the purchase of iron and other material now in possession of said railroad company, and the payment so made to said railroad company shall be used to pay and liquidate all of said indebtedness.

Witness our hands this 13th day of May, A. D. 1871.

DAVENPORT RAILWAY CONSTRUCTION CO.
By B. E. SMITH, *President.*
DAVENPORT AND ST. PAUL RAILROAD CO.
By H. PRICE, *President.*

172 EXHIBIT E.

Memorandum of an agreement made this twenty ninth day of February, eighteen hundred and seventy two, between the Davenport and St. Paul Railroad Company of the first part, and the Davenport Railway Construction Company of the second part, witnesseth:

Whereas the contract between the parties hereto made May twelfth, 1871 (eighteen hundred and seventy-one), does not provide for the party of the second part furnishing any rolling stock for the use of said road:

The said party of the second part agrees to furnish such rolling stock as shall be necessary for local tra'fic, the same to be subject to the first mortgage bonds and to hold the cost and interest on same as a claim

approval of a majority of the stockholders in interest, and also by the unanimous vote of the board of directors.

ART. 12. All the officers of this corporation shall hold their office until their successors are properly elected or appointed and qualified to succeed them. To the end that these articles of incorporation may be recorded as required by law, and become operative and effective, we corporators hereinbefore named have hereunto set our hands this 12th day of May, A. D. 1871.

W. DENNISON.
OAKES AMES.
B. E. SMITH.
OAKES A. AMES,
By OAKES AMES,
His Attorney.
H. PRICE.

Filed for record the 17th day of May, 1871, at 11.15 a. m.
F. M. SUITER,
Recorder.

167 EXHIBIT D.

Article of agreement made and entered into this 12th day of May, A. D. 1871, between the Davenport Railway Construction Company, a corporation organized under the laws of the State of Iowa of the first part, and the Davenport and St. Paul Railroad Company, a corporation organized and existing by the same authority of the second part, witnesseth:

That the said construction company, for and in consideration of the covenants and stipulations hereinafter contained, to be performed by the said railroad company, will furnish all the iron and material necessary for the building and furnishing of the Davenport and St. Paul Railroad, with its stations, side-tracks, shops, depots, turn-tables, and water tanks, from Eldridge Junction, in Scott County, Iowa, to St. Paul, in the State of Minnesota, or such intermediate point as connections of a satisfactory character can be made, to form a line
168 to St. Paul, the iron spikes and all other material to be of as good quality as that now in said railroad from Davenport to Maquoketa, and to do all these things as fast as the road-bed is properly graded, bridged, and tied, with right of way and depot grounds, with stock at par.

The said railroad company agrees to prepare and finish the grading and bridging of said line of road, and furnish the ties for the same, with right of way and depot grounds, the cost of which is to be represented by stock at par, and to pay the said construction company twenty thousand ($20,000) dollars per mile in the bonds of said railroad company, which bonds shall be twenty (20) year seven per cent. gold bonds free of Government tax, with the interest payable semi-annually in the city of New York on the first days of January and July.

Said boards to be secured by a first mortgage on all the property and franchises of said railroad company, and in further consideration also agree to issue and deliver to said Construction
169 company five (5) per cent. over and above one-half of all the stock that has been or may be issued by said Davenport and St. Paul Railroad Company, so that said construction company will have a con-

trolling interest in said stock, the bonds of said railroad company shall be issued as follows, to wit: When five (5) miles of said road are ironed and finished with the proper buildings, stations, turn-tables, side tracks, water-tanks, &c., then $100,000 of the bonds of said railroad company properly executed shall be delivered to the said construction company and so on from time to time as fast and as often as another five miles shall be so finished, so that the said construction company shall receive $100,000 of said bonds for every five miles of said railroad so finished and ready for operation as aforesaid.

All the bonds of said company amounting to six millions ($6,000,000) shall be duly executed by said Davenport and St. Paul Railroad Company and be placed in escrow or trust with the Farmers' Loan and
170 Trust Company in the city of New York, subject to delivery to said construction company, under the terms and conditions of this contract when certified by the president of the railroad company and the president of the construction company.

And it is further understood and agreed that if the construction company can sell or dispose of the whole or part of said bonds in advance of the actual completion of any of the sections of said road, said construction company may sell and dispose of the same, but all proceeds derived therefrom shall be paid into the said trust company and be held by it at current deposit rates of interest, and said proceeds shall only be paid out rateably from time to time as each five miles of road are ready for business as hereinbefore provided for the delivery of bonds; that is, the proceeds of each $100,000 of bonds and deposit interest thereon shall be paid over for each five miles of road completed, and if it should occur that all of said miles of road representing the whole of said six (6) millions of bonds under this contract should not be constructed, then
171 all proceeds remaining with said trust company whether in bonds or cash shall revert to the Davenport and St. Paul Railroad Company.

It is understood that the entire indebtedness of the Davenport and St. Paul Railroad Company does not exceed $50,000, and the said company agrees that so much of the first payment of said construction company as may be required shall be applied to the purchase of iron and other material now in possession of said railroad company, and the payment so made to said railroad company shall be used to pay and liquidate all of said indebtedness.

Witness our hands this 13th day of May, A. D. 1871.

DAVENPORT RAILWAY CONSTRUCTION CO.
By B. E. SMITH, *President.*
DAVENPORT AND ST. PAUL RAILROAD CO.
By H. PRICE, *President.*

172 EXHIBIT E.

Memorandum of an agreement made this twenty ninth day of February, eighteen hundred and seventy two, between the Davenport and St. Paul Railroad Company of the first part, and the Davenport Railway Construction Company of the second part, witnesseth:

Whereas the contract between the parties hereto made May twelfth, 1871 (eighteen hundred and seventy-one), does not provide for the party of the second part furnishing any rolling stock for the use of said road:

The said party of the second part agrees to furnish such rolling stock as shall be necessary for local tra'fic, the same to be subject to the first mortgage bonds and to hold the cost and interest on same as a claim

against the Davenport and St. Paul Railroad Company for future payment. This agreement is supplementary to said contract of May twelfth (12th), eighteen hundred and seventy-one (1871).

(Signed) DAVENPORT AND ST. PAUL R. R. CO.
By GEO. H. FRENCH, *President.*

(Signed) DAVENPORT R'Y CONSTRUCTION CO.
By B. E. SMITH, *President.*

Witnesses:

(Signed) A. CARRIEGIE,
M. DONAHUE.

173 EXHIBIT F.

Release of mortgages.

THE DAVENPORT AND ST. PAUL R. R.
with
JOHN EDGAR THOMPSON, AND WILLIAM DENNISON, and the Davenport Railway Construction Company. Release.

This indenture made the 24th day of August, one thousand eight hundred and seventy-two, by and between the Davenport and Saint Paul Railroad Company, a corporation created, organized, and existing by and under the laws of State of Iowa, party of the first part, John Edgar Thompson, of the city of Philadelphia, Pennsylvania, and William Dennison, of the City of Columbus, Ohio, parties of the second part, and the Davenport Railway Construction Company, a corporation also created, organized, and existing under the laws of said State of Iowa, party of the third part, witnesseth.

Whereas the said party of the third part is now the owner and holder of all the bonds of said party of the first part of the issue men-
174 tioned in and provided for in a certain mortgage or deed of trust dated July 1, 1871, made and executed by and between said party of the first part and said parties of the second part, and duly recorded before the execution of these presents.

And whereas said party of the first part and said parties of the second part heretofore, at the request of said party of the third part, have made and executed a certain deed supplemental to and amendatory of said mortgage or deed of trust, providing among other things for the surrender of said bonds in order to the same being endorsed; and also at a latter day a certain other deed likewise supplemental to and amendatory of said mortgage or deed of trust dated March 1st, 1872, providing, among other things, for the surrender and cancellation of said bonds, and the issuing of certain other bonds in exchange for the same which said supplemental deeds have been duly recorded before the execution of these presents:

And whereas said bonds have not been surrendered either for
175 the said endorsement or for the said exchange in said two supplemental deeds provided for; and whereas before the execution of these presents a new mortgage or deed of trust has been made and executed by and between said party of the first part, and said parties of the second part likewise bearing date July 1, 1871, and it is the intention of these presents to effect the surrender of said bonds the release of said former mortgage or deed of trust, and the said two deeds supplemental to and amendatory thereof, and the reissue of said bonds under the new mortgage or deed of trust:

Now, therefore, these presents witness:

1. That in consideration of the premises and of other good and valuable considerations it thereunto moving, the said party of the third part hereby surrenders to the said party of the first part the said bonds, to be reissued to it under the provisions of said new mortgage or deed of trust, and the said party of the first part hereby accepts such surrender.

2. That in consideration of the premises and of other good and
176 valuable considerations them thereunto moving, said parties of the second part, and the said party of the third part, hereby release and discharge the said mortgage or deed of trust first above recited and mentioned, and the said two deeds supplemental to and amendatory thereof, and hereby consent and direct that each and every of the same be cancelled and discharged of record.

3. That in consideration of the premises and of other good and valuable consideration it thereunto moving, said party of the first part hereby delivers to said parties of the second part the said bonds so surrendered, and the said parties of the second part accept the same, to be reissued by them under the provisions of said new mortgage or deed of trust lastly above recited to said party of the third part, as the bonds of the party of the first part, of the issue mentioned and provided for therein.

In witness whereof the said party of the first part has caused these presents to be subscribed by its president and secretary, and its corporate seal to be hereunto affixed, and the said parties of the sec-
177 ond part have hereunto set their hands and seals, and the said parties of the third part has likewise caused these presents to be subscribed by its president and secretary, and its corporate seal to be hereunto affixed the day and year first above written.

DAVENPORT AND ST. PAUL RAILROAD COMPANY.
[SEAL.] By GEO. H. FRENCH, *President.*

Attest:

J. S. CONNOR, *Secretary.*
J. EDGAR THOMPSON, [SEAL.]
Trustee.
W. DENNISON, [SEAL.]
Trustee.

DAVENPORT RAILWAY CONSTRUCTION CO.,
[SEAL] By B. E. SMITH, *President.*

Attest:

G. F. McCANDLESS, *Secretary.*

178 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this 14th day of December, A. D. 1872, before me, William H. Clarkson, a commissioner of the State of Iowa in and for the State of New York, residing in said city of New York, personally appeared B. E. Smith, the president of the Davenport Railway Construction Company, and G. F. McCandless, the secretary of the same company, to me respectively personally known to be such, who being by me severally duly sworn, did depose and say that he, said B. E. Smith, resided in Columbus, in the State of Ohio; that he, said G. F. McCandless, resided in said city of New York; that he, said B. E. Smith, was the president, and he, the said G. F. McCandless, was the secretary of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate

seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said B. E. Smith and G. E. Mc-
179 Candless, signed their names thereto by the like order as president and secretary of said company respectively; and the said B. E. Smith and G. F. McCandless, who are to me known to be the identical persons whose names are affixed to said instrument, also acknowledged the said instrument to be their own voluntary act and deed, and the voluntary act and deed of said company.

In witness whereof I have hereunto set my hand and affixed my official seal.

[L. S.] WILLIAM H. CLARKSON,
Commissioner for Iowa in New York.

STATE OF IOWA,
Scott County, ss:

Be it remembered that on this twenty-sixth day of August, A. D. 1872, before me, a notary public in and for the said county, personally came Geo. H. French, president, and J. S. Connor, secretary, of the Davenport and St. Paul Railroad Company, to me known to be the identical persons named in and who subscribed the foregoing instrument
180 and severally acknowledged the execution thereof to be their voluntary act and deed and the voluntary act and deed of the said The Davenport and St. Paul Railroad Company.

Given under my hand and notarial seal at Davenport, in the said county, the day and year above written.

[L. S.] J. D. CAMPBELL,
Notary Public.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it remembered that on this tenth day of December, A. D. 1872, before me the subscriber, a notary public for the city of Philadelphia, personally came J. Edgar Thompson, to me known to be the identical person named in and who subscribed the foregoing instrument as a party of the second part, and who acknowledged the execution thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

181 Witness my hand and notarial seal the day and year above written.

[L. S.] HENRY C. SPACKMAN,
Notary Public.

STATE OF OHIO,
Franklin County, ss:

Before me, the undersigned, a notary public in and for said county, personally appeared the within-named William Dennison, and acknowledged the signing and sealing of the foregoing instrument as a party of the second part to be his voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and notarial seal this 19th day of December, A. D. 1872.

[L. S.] T. J. JANNEY,
Notary Public in and for Franklin County, Ohio.

RECORDER'S OFFICE, SCOTT COUNTY, IOWA,
Davenport, Dec. 24th, 1872.

I hereby certify that this instrument was filed for record in the office

of the recorder of Scott County, Iowa, on the 24th day of Dec., 1872, at 2.45 p. m. and recorded in Book R, Townlot Mortgages, at page
182 540, 544.

F. M. SUITER,
Recorder.

RECORDER'S OFFICE, CLINTON COUNTY, IOWA,
Clinton, Jan. 9, 1873.

I hereby certify that this instrument was filed for record in the office of the recorder of Clinton County, Iowa, on the 9th day of January, 1873, at 10.45 a. m. and recorded in Book 20 of mortgages, pages 289, 290, 291, and 292.

H. F. BOWERS,
Recorder.

RECORDER'S OFFICE, CEDAR COUNTY, IOWA,
Tipton, Jan., 14th, 1873.

I hereby certify that this instrument was filed for record in the office of the recorder of Cedar County, Iowa, on the 14th day of January, A. D. 1873, at 12 m. and recorded in Book J of mortgages, pages 626, 627, 628, 629, and 630.

C. W. HAWLEY,
Recorder.

183 RECORDER'S OFFICE, JACKSON COUNTY, IOWA,
Andrew, May 2d, 1873.

I hereby certify that this instrument was filed for record in the office of the recorder of Jackson County, Iowa, on the 2d day of May, 1873, at 11 o'clock a. m. and recorded in Book K of mortgages, pages 273, 274, 275, and 276.

J. R. GRIFFIN,
Recorder.

RECORDER'S OFFICE, JONES COUNTY, IOWA,
Anamosa, May 7th, 1873.

I hereby certify that this instrument was filed for record in the office of the recorder of Jones County, Iowa, on the 7th day of May, A. D. 1873, at 9 o'clock a. m., and recorded in book 30 of mortgages, on pages 576, 579.

RICHARD McDANIEL,
Recorder.

RECORDER'S OFFICE, DELAWARE COUNTY, IOWA,
Delhi, May 12th, A. D. 1873.

I hereby certify that this instrument was filed for record in the office of the recorder of Delaware County, Iowa, on the 12th day of
184 May, A. D. 1873, at 1 o'clock p. m., and recorded in book B of mortgages of town lots, on pages 547, 548, 549, 550, and 551.

HENRY HARGER,
Recorder.

STATE OF IOWA,
Delaware County, ss:

I, H. C. Jackson, recorder of said county, do hereby certify that the above and foregoing is a full, true, correct, and examined copy of the

record of a release from the Davenport and St. Paul Railroad Company with J. Edgar Thompson and William Dennison and the Davenport Railway Construction Company, as the same appears in my office in book B of mortgages of town lots, on pages 547, 548, 549, 550, and 551.

Witness my hand this 22d day of April, A. D. 1876.

H. C. JACKSON,
Recorder of Delaware Co., Iowa.

185 EXHIBIT G.

Resolutions of Davenport Railway Construction Company and a guarantee of French and others.

Whereas the Davenport Railway Construction Company has passed the following preamble and resolution dated March 28th, 1872.

Whereas it is deemed advisable for the purpose of fully satisfying the purchasers of the first mortgage bonds of the Davenport and Saint Paul Railroad Company that the local subscription and grants to the said company are and will be sufficient to prepare the whole of the said line for the rails, as is required by the terms of the contract made with this company for its construction:

Be it resolved, That this company hereby guarantees that such subscriptions and grants shall be sufficient for the said purpose, or that should they prove insufficient this company hereby undertakes
186 and agrees to make good any deficiency, and to finish the preparation of the line for the rails out of its own resources.

DAVENPORT RAILWAY CON. CO.
Attest: (Signed) G. F. McCANDLESS,
Sec'y pro tem.

I hereby certify that the foregoing is a true copy of the preamble and resolutions adopted by the Davenport Railway Construction Company at its meeting on the 28th of March, 1872.

G. F. McCANDLESS,
Sec'y pro tem.

The undersigned guarantee, as hereinafter mentioned, the faithful performance by the Davenport Railway Construction Company, of its obligations recited in the foregoing resolution in substance and form as therein stated; that is to say, each of the undersigned agree to make good his proportion of any amount necessary to finish the preparation of the Davenport and St. Paul Railroad for the rails not provided for by the Davenport Railway Construction Company, contemplated in the foregoing resolution.

(Signed) GEO. H. FRENCH.
" B. E. SMITH.
187 (Signed) W. DENNISON.
" THOM. L. JEWETT.
" ANDREW CARNEGIE.
" OAKES AMES.

EXHIBIT H.

Resolutions of stockholders.

Whereas, it is deemed advisable for the purpose of fully satisfying the purchasers of the first mortgage bonds of the Davenport and St. Paul R. R. Co.:

First. That the local subscriptions and grants to the said company are

and will be sufficient to prepare the whole of the said line for the rails as is required by the terms of the contract made with the company for its construction:

Second. That the net proceeds of the first mortgage bonds of the said Davenport and St. Paul R. R. Co., issued at the rate of $20,000 per mile of line, are and will be sufficient to iron and equip the whole of the said railroad:

188 Be it resolved, first, That this company hereby guarantees that such subscriptions and grants shall be sufficient for the said purpose, or that should they prove insufficient this company hereby undertakes and agrees to make good any deficiencies, and to finish the preparation of the whole of said line for the rails out of its own resources.

Second. That this company hereby guarantees that the net proceeds of $20,000 first mortgage bonds per mile shall be sufficient to iron and equip the whole of the said railroad, and should such proceeds prove insufficient this company hereby undertakes and agrees to make good any deficiency, and to finish the ironing and equipping of the whole of the said line out of its own resources.

At a meeting of the stockholders of the Davenport Railway Construction Company, held in the city of New York, on the 16th day of May, 1872, the above resolution was unanimously adopted.

(Signed) G. F. McCANDLESS,
Secretary Davenport Railway Construction Co.

189 EXHIBIT I.

Letter to Sulzbach, and prospectus.

Messrs. SULZBACH AND BROS.,
Frankfort on-Main:

GENTLEMEN: Enclosed we beg to hand you the prospectus for the issue of $6,000,000.00 first mortgage gold bonds of the Davenport and St. Paul Railroad Company, which has been duly undersigned by us, and by these presents we appoint you our agents to receive *to receive* in our names, either yourselves or by substitution, subscriptions in accordance with the said prospectus.

We at the same time declare ourselves, jointly and severally, responsible towards you, your substitutes, and all third parties and persons thereto interested, for the veracity, and the true and exact statement of all therein mentioned facts, and further declare that at any time we shall be, jointly and severally, *be* bound to enter on your or your substitutes' stead and place, as defendants, should any of the holders of the said bonds ever bring any claims or actions in law or equity against you or your substitutes with regard to such, and to hold you or your

190 substitutes entirely harmless and indemnified against all damages arising out of such claims or action.

Dated May 16th, 1872.

[L. S.] DAVENPORT AND ST. PAUL RAILROAD CO.,
By GEO. H. FRENCH, *President.*

Attest:

W. H. PRICE,
Secretary Davenport and St. Paul Railroad Co.

DAVENPORT RAILWAY CONSTRUCTION CO.,
[L. S.] By B. E. SMITH, *President.*

Attest:

G. F. McCANDLESS,
Secretary Davenport Railway Construction Company.

DAVENPORT AND ST. PAUL RAILROAD COMPANY.

First mortgage 7 per cent. gold bonds.

Issue of six millions of dollars divided into 6,000 bonds for $1,000 gold each, bearing interest at 7 per cent. per annum from the first of July, 1871, payable half yearly, on the first of January and first of July, in New York at $35.00 in United States gold coin, in London at £7.5.10 sterling, and in Frankfort-on-Main at F. 87.30.

191 Principal payable first of July, 1911, at par, in the city of New York, in United States gold coin.

Both principal and interest payable free of United States taxes.

Annual sinking fund of $40,000 to begin July 1st, 1875.

The company's line is about three hundred miles in length. It commences at Davenport, the largest and most important city in the State of Iowa, and runs in a northwesterly direction to the city of St. Paul, in the State of Minnesota, in its route crossing and connecting with the following railways: 1. The Winona and St. Peter Railroad. 2. The Chicago, Iowa and Nebraska Railroad. Both of these now forming part of the Chicago and Northwestern Railway system. 3. The Dubuque and Sioux City Railroad, now leased and operated by the Illinois Central Railroad. 4. The McGregor and Sioux City Railroad. 5. The McGregor and Western Railroad. Both of these now forming part of the Milwaukee and St. Paul Railway Company's system. 6. The Southern Minnesota Railroad. At St. Paul its railway connections are:

192 1. The Lake Superior and Mississippi Railroad. 2. The St. Paul and Pacific Railroad. 3. The Minnesota and Pacific Railroad. The two latter now forming part of the Northern Pacific Railway system.

At Davenport the connections are:

1. The Chicago, Rock Island and Pacific Railroad.
2. The Western Union Railroad.
3. The Peoria and Rock Island Railroad.

The Davenport and St. Paul Railroad has recently passed into the hands of what is generally termed the Pennsylvania party, and a contract for its completion has been entered into as an extension of the line recently constructed by the same interest from Peoria, Illinois, to Rock Island, opposite Davenport. The construction of this line will secure to the Pennsylvania systems of roads unbroken rail connection from the city of St. Paul, Minnesota, to the Atlantic seaboard, a distance of about 1;450 miles, solely under their control, and undisturbed by any conflicting interest whatever.

193 It may be safely claimed for the Davenport and St. Paul Railroad that it will, from the very start, reap the advantages flowing from the close and intimate relations with commanding connections, and constitute an important link in one of the longest through routes in the United States.

The line from Peoria to Rock Island, already in successful operation, which has been referred to, connects with the Davenport line by means the new iron bridge under course of construction across the Mississippi River between Rock Island and Davenport.

This latter city is in the immediate vicinity of extensive coal fields, and the supply for the region served by the new line must pass over it from its eastern terminus; this indispensible article is at present transported by wagons to points on and near the line for distances ranging between forty and fifty miles. A large, remunerative, and constantly

increasing traffic can therefore be confidently calculated upon from this source; besides the localities through which the line runs through
194 the State of Iowa are noted as amongst the most populous and fertile in grain, corn, horses, cattle, mules and sheep, and for productiveness they are not exceeded by any equal number of square miles in the United States.

Attention is called to the reports of the principal railways in Iowa for 1870, as given in Poor's Railway Manual for 1871, from which it will be seen that their gross receipts per mile were much beyond what will be required to yield net revenues sufficient to meet the interest charge upon the Davenport and St. Paul line, even if the operating expenses of the leased line are estimated as high as seventy per cent. of their gross receipts.

No return is made of the operating expenses of the leased lines of Iowa, but the returns of the lines not so leased show them to have been operated during the year 1870 at not exceeding 55 per cent. of their gross receipts.

The following are the railway lines and the statements referred to:

195	Length, miles.	Gross receipts.	Gross receipts per mile.
The Chicago, Rock Island and Pacific Railroad, partly in Illinois	591	$5,995,266	$10,144
Leased lines of the Chicago and Northwestern Railroad, in Iowa	354	3,419,086	9,658
Leased lines of the Milwaukee and St. Paul Railroad	328	1,957,780	5,674
Leased lines of the Illinois Central Railroad	268	1,467,405	5,475
Burlington and Missouri Railroad	333	2,156,846	6,477

The share capital is fixed at $9,000,000.

By the terms of the contract for the construction of the line sufficient local subscriptions to the share capital of the company are to be obtained to prepare the line for the rails, so that the proceeds of the bonds are only required for the purchase of rails and equipment, and in addition to these purchases bondholders will therefore possess the additional security imparted by a large share capital expended or to be expended in the grading, bridging, and tieing of the line.

196 The issue of bonds is restricted to $20,000 per mile. One hundred miles of the line are already completed and in operation from Davenport, and fifty miles more are ready for the rails; the work of grading, bridging and tieing thereof having been done. The grades and curves of the line are light and consequently the cost of keeping it in repair will be small.

The bonds will be for the sum of $1,000 each in American gold coin, payable to bearer, and will bear interest at 7 per cent. per annum from the first day of July, 1871, payable semi-annually upon presentation and surrender of the relative interest coupons attached to the bonds on the first days of January and July, at the option of the holder, in the city of New York, in the sum of $35.00 in United States gold coin, in the city of London £7 5 10 in British sterling money, in the city of Frankfort-on-Main, 87 florins 30 kreutzers. The principal of the bonds will be payable in the city of New York on the first day of July, 1911, in United States gold coin. All payments of principal or interest on the bonds are to be made free and clear of all United States taxes. The bonds are transferable by delivery, but they may be registered as to their ownership, in a registry to be kept by the company.

The bonds are further authenticated by the endorsement of the trustee thereon, without which they are invalid. The owners of the stock shall have the right at any time to convert them into stock of the com-
197 pany at par. The payment of the bond is secured by a first mortgage of the company dated July 1st, 1871, on its road, bridges, depot grounds, buildings, rolling stock, machinery, franchises, and all its property of every kind, as also net incomes acquired and to be acquired, to John Edgar Thompson, of Philadelphia, at present president of the Pennsylvania Railroad Company, and William Dennison, of Columbus, late governor of Ohio, as trustees for the bondholders.

The bonds are moreover secured by a sinking-fund of $40,000 per annum, to begin July 1st, 1875, to be set apart and increased annually for the redemption and eventual payment of the said bonds.

The company will appoint for this purpose a sinking-fund commissioner or commissioners, and deposit with him or them on the first day of July, 1875, the above mentioned amount of $40,000, and so continue on the first day of July of each and every year to deposit with the commissioner or commissioners the like sum of $40,000, such annual deposits to be continually invested and compounded with the interest
198 thereof for the increase of the said sinking-fund until the maturity of said bonds.

Such sinking-fund moneys shall from time to time under the order of the company be invested in the purchase of the bonds hereby secured as long as the same can be obtained under or at par, and when this cannot be done, then in such other bonds as shall be designated by the company, with the consent of the trustees, and all the moneys and funds solely to be used to redeem and eventually pay off the first mortgage bonds of the company.

Signed the 16th day of May, A. D. 1872.

DAVENPORT AND ST. PAUL RAILROAD COMPANY,
By GEO. H. FRENCH, *President.*

Attest:

W. H. PRICE,
Secretary D. and St. P. R. R. Co.

DAVENPORT RAILWAY CONSTRUCTION COMPANY,
By B. E. SMITH, *President.*

Attest:

G. F. McCANDLESS,
Secretary Davenport Railway Construction Co.

199 EXHIBIT J.

Resolutions of the Railroad and Construction Companies authorizing Sulzbach to sell bonds.

Whereas it is proposed to place upon the market the bonds of this company mentioned and described in the mortgage heretofore executed by this company to Messrs. Thompson and Dennison, as trustees, dated July 1, 1871, which said bonds have been sold by this company to the Davenport Construction Company; and

Whereas said Davenport Construction Company has requested this company to approve of and consent to a prospectus of such bonds, and to give to Messrs. Sulzbach Brothers, of Frankfort-on-Main, or their substitutes, a formal authorization to negotiate and sell the same; therefore,

Resolved, That the president and secretary be directed to execute under the corporate seal of this company the letter of authorization and the prospectus now before this meeting for adoption.

That said letter of authorization and prospectus be entered at
200 large upon the minutes of this meeting, and that an authenticated copy of this resolution be delivered herewith.

I hereby certify the within and foregoing preamble and resolution to be a true and correct copy as passed at the meeting held in the city of Davenport, Iowa, June 29th, 1872.

W. H. PRICE,
Sec'y D. and St. P. Railroad Co.

Whereas it is proposed to place upon the market the bonds of the Davenport and St. Paul Railroad Company mentioned and described in the mortgage heretofore executed by the same company to Messrs. Thompson and Dennison, as trustees, dated July 1st, 1871, which said bonds have been sold to this company; and

Whereas said railroad company has requested this company to approve of and consent to a prospectus of such bonds, and to give Messrs. Sulzbach Brothers, of Frankfort-on-Main, or their substitutes, a formal authorization to negotiate and sell the same; therefore,

201 Resolved, That the president and secretary be directed to execute under the corporate seal of this company the letter of authorization and the prospectus now before this meeting for adoption.

That said letter of authorization and prospectus are entered at large upon the minutes of this meeting, and that an authenticated copy of this resolution be delivered herewith.

I hereby certify the within and foregoing preamble and resolution to be a true and correct copy as passed at the meeting held in the city of New York.

G. F. McCANDLESS,
Sec'y Davenport Railway Construction Co.

MAY 16TH, 1872.

EXHIBIT K.

Resolutions of stockholders approving equipment contract.

At a meeting of the stockholders of the Davenport Railway Construction Company held at 57 Broadway, New York, at the office of the treasurer, A. Carnegie, May 16th, 1872, on motion, it was resolved that the stockholders of the Davenport Railway Construction Company
202 hereby approve the contract for equipment made with the Davenport and St. Paul Railroad Company on the 29th day of February, 1872, which contract is as follows, viz:

Memorandum of an agreement made this twenty-ninth day of February, eighteen hundred and seventy-two, between the Davenport and St. Paul Railroad Company of the first part and the Davenport Railway Construction Company of the second part witnesseth:

Whereas the contract between the parties hereto made May 12 (twelfth), 1871 (eighteen hundred and seventy-one), does not provide for the party of the second part furnishing any rolling-stock for the use of said road;

The said party of the second part agrees to furnish such rolling-stock as shall be necessary for local traffic, the same to be subject to the first-

mortgage bonds, and to hold the cost and interest on same as a claim against the Davenport and St. Paul Railroad Company for future payment.

This agreement is supplementary to said contract of May (12) twelfth, (1871) eighteen hundred and seventy-one.

(Signed) DAVENPORT & ST. PAUL R. R. Co.,
203 By GEO. H. FRENCH, *President.*
(Signed) DAVENPORT RAILWAY CONS. Co.,
[SEAL.] By B. E. SMITH, *President.*
G. F. MCCANDLESS, *Secretary.*

Extracts from the minutes:

EXHIBIT L.

Resolutions explaining equipment contract.

At a meeting of the stockholders of the Davenport Railway Construction Company held at their office in the city of New York, the 26th day of June, A. D. 1872, the following resolution was adopted:

Whereas by the terms of the supplementary contract between this company and the Davenport and St. Paul R. R. Co., dated February 29th, 1872, it was agreed that this company shall furnish certain rolling-stock, which shall be subject to the first-mortgage bonds of the said Davenport and St. Paul Railroad Company, the cost and interest of the same to be held by this company as a claim against the said railroad company for future payment:

204 It is hereby expressly declared that the said future payment can only be made or demanded from the surplus net earning of the said railroad company when the same shall exceed the interest charged and sinking fund of the said mortgage bonds, the true intent and meaning of the claim being simply to permit the Davenport Railway Construction Company, should it so elect, to collect the same without prejudice to the rights of the holders of the said first-mortgage bonds before dividends are declared upon the share capital of the Davenport and St. Paul Railroad Company.

(Signed) BENJ. E. SMITH,
President Davenport Railway Construction Co.
(Signed) [SEAL.] G. F. MCCANDLESS,
Secretary Davenport Railway Construction Co.

NEW YORK, *June* 26, 1872.

We hereby certify the foregoing to be a true copy of a resolution passed as above, and that the same is duly recorded upon the minutes of this company.

(Signed) BENJ. E. SMITH,
205 *President Davenport Railway Construction Co.*
(Signed) [L. S.] G. F. MCCANDLESS,
Secretary Davenport Railway Construction Co.

NEW YORK, *June* 26, 1872.

At a meeting of the directors of the Davenport and St. Paul Railroad Company, held in the city of Davenport, Iowa, the 29th day of June, A.

D. 1872, the foregoing having been submitted, "It was resolved, that the same be and is hereby approved by this company."

(Signed) GEO. H. FRENCH,
President Davenport & St. Paul R. R. Co.

(Signed) [L. S.] W. H. PRICE,
Secretary Davenport & St. Paul R. R. Co.

DAVENPORT, IOWA, *June 29th*, 1872.

We hereby certify the foregoing to be a true extract from the minutes of the company.

(Signed) GEO. H. FRENCH,
President Davenport & St. Paul R. R. Co.

(Signed) [L. S.] W. H. PRICE,
Secretary Davenport & St. Paul R. R. Co.

DAVENPORT, IOWA, *June 29th*, 1872.

206 EXHIBIT M.

Certificate of Smith and others that $16,000 is the amount required to iron and equip road.

To whom it may concern:

We hereby state that from our own personal experience in the construction of railroads in the Western States and especially from our knowledge of the general characteristics of the Davenport and St. Paul Railroad, that the sum of sixteen thousand dollars per mile is amply sufficient to iron and fully equip the line for traffic.

B. E. SMITH.
C. N. GRIGGS,
Ex-President I. B. and W. R. R.
OAKES AMES,
Ex-President Union Pacific R. R.
JOHN S. KENNEDY,
Of S. S. Kennedy & Co., New York.
THOS. A. SCOTT,
President Toledo, Peoria and Warsaw R. R.
OSCAR TOWNSEND,
Vice-President Cleveland, Columbus and Cincinnati R. R.
SPRINGUE HARBAUGH,
Ex-Director Union Pacific.
WM. DENNISON.
J. EDGAR THOMPSON,
President Pennsylvania R. R.
G. B. ROBERTS,
Vice-President Pennsylvania R. R.
ANDREW CARNEGIE.

207 EXHIBIT N.

Agreement of construction company and trustees that only $16,000 of bonds should be issued to the mile.

Memorandum of an agreement made and concluded between the Davenport Railway Construction Company, party of the first part, and John

Edgar Thompson and William Dennison, trustees of the Davenport and St. Paul Railroad Company's first mortgage bonds, witnesseth:

First. It is agreed that the said trustees shall pay over to the said construction company the proceeds of the first mortgage bonds of the Davenport and St. Paul Railroad Company only at the rate of sixteen (of sixteen) thousand dollars per mile, as each ten miles of the Davenport and St. Paul Railroad line are ironed and equipped.

Second. The said Davenport Construction Company hereby accepts the foregoing.

In witness whereof we have hereunto affixed our hands and seals this twenty-sixth day of June, A. D. 1872.

DAVENPORT RAILWAY CONSTRUCTION CO.,
[L. S.] By BENJ. E. SMITH, *President.*
Witness to the signature B. E. Smith:
J. MOODIE.
208 J. EDGAR THOMPSON, *Trustee.*

Witness to the signature John Edgar Thompson—
GILEAD A. SMITH.
WM. DENNISON, *Trustee.*
Witness to the signature Wm. Dennison—
J. MOODIE.
NEW YORK, *June* 26, 1872.

The foregoing having been submitted to a meeting of the directors of the Davenport and St. Paul Railroad Company, held in the city of Davenport, the 29th day of June, A. D. 1872, it was resolved that the same be and is hereby approved by this company.

G. H. FRENCH,
President Davenport and St. Paul Railroad Co.
W. H. PRICE,
Secretary Davenport and St. Paul Railroad Co.

We hereby certify the above to be an extract from the minutes of the said company.

G. H. FRENCH,
President Davenport and St. Paul Railroad Co.
W. H. PRICE,
Secretary Davenport and St. Paul Railroad Co.
209 DAVENPORT, IOWA, *June 29th*, 1872.

Whereas the Davenport Railway Construction Company proposes to surrender to this company all of the bonds heretofore issued by this company, under the mortgage or deed of trust dated July 1st, 1871, to Messrs. Thompson and Dennison, trustees, and the deeds supplemental to and amendatory thereof, for the purpose of issuing the same; and

Whereas the company has consented to and hereby consents to such surrender of said bonds, and to the cancellation and extinguishment of said mortgage and supplemental deeds, are to the execution of a new mortgage to secure said bonds, and the reissue of said bonds thereunder; therefore,

Resolved, That the president and secretary be directed to accept on behalf of this company the surrender of said bonds, for the purpose of reissuing the same, and that before reissuing any such bonds the president and secretary be directed to execute, under corporate seal
210 of this company, a new mortgage or deed of trust, in the words and figures following, to wit

FOLLOWING TEXT OF MORTGAGE.

I hereby certify that the foregoing resolution was passed at the meeting of the executive committee of the Davenport and St. Paul Railroad Company, held at the city of New York, May 16th, 1872, and that the same, having been reported to the board of directors of said company, was duly ratified and adopted as the act and proceedings of this company, and that the bonds in said resolution referred to were surrendered to this company for the purpose of reissuing the same under the provisions of said new mortgage.

In witness whereof I have hereunto set my hand and the seal of said company, at the city of Davenport, Iowa, the 29th day of June, 1872.

G. H. FRENCH,
President Davenport and St. Paul Railroad Co.

Attest:

W. H. PRICE,
Secretary.

(Endorsed:) Moses De Witt Loomis vs. D. & St. P. R'y. Agreed st. of facts. Claim of John Hornby. Filed May 25, '77. E. R. Mason, clerk.

211 On the 26th day of May, 1877, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

112 United States circuit court, district of Iowa, May term, A. D. 1877. Saturday, May 26, 1877.

MOSES DE WITT LOOMIS AND LEWIS H. MEYER *vs.* THE DAVENPORT AND ST. PAUL RAILROAD Company et al. } No. 552. Eq.

And now this 25th day of May, 1877, the claim for a mechanic's lien by John Hornby, one of the defendants herein, coming on to be heard, on the issues made by the bill, answer, and replication, and the cross-bill of John Hornby, and answer thereto; the said John Hornby, appearing by James T. Lane, his counsel, and the plaintiffs appearing by James Grant, their counsel; and after hearing the testimony and the arguments of counsel, the court, being fully advised in the premises, finds that there is now due and owing to said John Hornby by the Davenport and St. Paul Railroad Company the sum of thirteen thousand one hundred and seventy-six dollars and seventy-four cents
213 ($13,176.74), with interest from this date at the rate of six per cent. per annum, and is entitled to a mechanic's lien prior and superior to the mortgage lien of the plaintiffs. It is therefore ordered, adjudged, and decreed by the court, that the said John Hornby do have and recover of and from the Davenport and St. Paul Railroad Company, one of the defendants herein, the said sum of thirteen thousand one hundred and seventy-six dollars and seventy-four cents ($13,176.74), with interest thereon from this date at the rate of six (6) per cent. per annum, and his costs herein taxed at dollars.

And it is further adjudged and decreed that said John Hornby do have a mechanic's lien to secure said sum of $13,176.74, with the interest thereon and costs, upon the erections, excavations, embankments, bridges, road bed, right of way, and upon all lands upon which the

same may be situated, on that part of the line of the railroad of the said Davenport and St. Paul Railroad Company, as now located, staked out, and constructed from Pine Hill Cemetery into and through
214 the city of Davenport, in the county of Scott, and State of Iowa, and the said mechanic's lien is hereby adjudged and decreed to be prior and superior to the rights, liens, and claims of the said plaintiffs, and each of them.

And it is further adjudged and decreed that the said sum of $13,176.74, with the interest and costs, be paid within sixty days, and that if the same be not paid within the said sixty days from this date, that said property upon which said lien is herein established be sold on special execution by the marshal. And the said plaintiffs have offered in evidence the exhibits annexed to an' agreed statement of facts to prove that the defendant had not a prior lien, the court decided adversely to the plaintiffs for the causes of defense to Hornby's cross-claim on the merits, and not because the plaintiff had not specially alleged the facts set forth in his petition claiming a prior lien.

And thereupon the said plaintiffs, the trustees in said mortgage, prayed an appeal from the decree in said cause holding that said Hornby
215 has a prior lien to the plaintiff by reason of the claim set up in his answer, and to all of said decree adverse to the plaintiffs, which is allowed to operate as a supersedeas upon the plaintiffs filing bond in the penal sum of one thousand dollars, conditioned as the law directs, to be approved by the judge who signs the citation in the cause.

(S'g'd) J. M. LOVE.

216 On the 28 day of June, A. D. 1877, said complainants, by their said solicitor, filed in said clerk's office an appeal-bond in said cause, which said appeal-bond is in the words and figures following, to wit:

217 Know all men by these presents that we, Louis H. Meyer, principal, and John E. Henry & Whit M. Grant, surety, are held & firmly bound unto John Hornby in the penal sum of one thousand dollars, to which payment we bind ourselves and each of us. Given under under our hands and seals this the 29 day of May, 1877.

The condition of this obligation is this: Whereas the said Lewis H. Meyer & William Dennison have appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the district Iowa, rendered at the May term, 1877, in a cause therein pending, wherein said Lewis H. Meyer & Wm. Dennison were plaintiffs & the Davenport & St. Paul R. R. Company & John Hornby are defendants, in favor of John Hornby.

Now if said Meyer & Dennison shall prosecute their appeal with effect, and if they fail to make their plea good shall pay all dam-
218 ages and costs which may be adjudged against them, then this obligation shall be void; otherwise remain in full force.

(S'g'd) LEWIS H. MEYER,
" By GRANT.
" LEWIS H. MEYER,
" By GRANT AND OTHERS.
" JOHN E. HENRY.
" WHIT M. GRANT.

STATE OF IOWA,
Scott County, ss:

We, John E. Henry and Whit M. Grant, being duly sworn, depose and say that we are residents of the State of Iowa; that we are each of us worth the sum of one thousand dollars beyond the amount of our debts; that we have property in the State of Iowa liable to execution equal to the amount of half the of the penalty in the foregoing bond.

(S'g'd) JOHN E. HENRY.
" WHIT M. GRANT.

Subscribed and sworn to by John E. Henry and Whit M. Grant before me and in my presence this 19 day of June, 1877.

(S'g'd) [SEAL.] C. WHITAKER,
219 *Notary Public, Scott County, Iowa.*

Approved June 23, 1877.

JOHN F. DILLON, *Judge.*

(Endorsed:) In the circuit ct. U. S., dist. of Iowa. No. 552. Equity. Moses De Witt Loomis, Lewis H. Meyer vs. The D. & St. P. R'y Co. & others. Appeal bond in intervening claim of John Hornby. Filed Jun. 28, 1877. E. R. Mason, clerk.

220 On the 28th day of June, 1877, there was filed in said clerk's office in said cause a citation, the original of which is as follows:

221 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Hornby:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to an appeal filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Lewis H. Meyer & als. are plaintiffs in appeal & you are defendant, to show cause, if any there be, why the judgment rendered against plaintiffs in appeal, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge United States circuit court for the district of Iowa, this 18 day of June, 1877.

JOHN F. DILLON, *Judge.*

Service accepted this 21st day of June, 1877.

DAWSON & LANE.
Attorneys for John Hornby.

(Indorsed:) In cir. c't of U. S., dist. of Iowa. No. 522. Equity. Moses De Witt Loomis, Lewis H. Meyer vs. D. & St. P. R'y Co. & others. Citation in intervening claim of John Hornby. Filed Jun. 28, 1877. E. R. Mason, clerk.

222 In the circuit court of the United States for the district of Iowa.

I, Ed. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true, and complete copies of the bill of complaint, answer of John Hornby, replication to same, amendment to bill, stipulation that answer of Hornby be treated as a cross-bill, stipulation and agreed facts, final decree, appeal bond. I further certify that the original citation, with return of service en-

dorsed thereon, is hereto attached, the same being in a certain cause adjudicated in said court, wherein Lewis H. Meyer et al. are complainants and John Hornby and others are defendants, said copies being as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at my office in Des Moines, in said district, this 27 day of Sept., A. D. 1877.

[SEAL.]

E. R. MASON,
Clerk U. S. C. C., District of Iowa.

(Indorsement on cover:) No. 263. Lewis H. Meyer & William Dennison, trustees, app'ts, vs. John Hornby. Iowa C. C. U. S. Filed 10th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 2 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

NO. 263.

LEWIS H. MEYER, *et al.*, *Appellants*,

vs.

JOHN HORNBY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR LEWIS H. MEYER, THE APPELLANT,

BY

GRANT & GRANT.

FILED , 18 .

SUPREME COURT OF THE UNITED STATES.

NO. 263.

LEWIS H. MEYER, *et al.*, *Appellants*,
vs.
JOHN HORNBY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

Argument for the Appellants,

BY

GRANT & GRANT.

STATEMENT OF THE CASE.

This controversy originates out of the foreclosure suit of a mortgage given by the Davenport & St. Paul Railroad Cn., dated on the first day of July, 1871. (Record of petition page 1.)

John Hornby was made a party defendant. He answered, setting up two claims, one of which does not figure in this suit.

On page 10 of the record, Hornby says that on the 9th of October, 1872, he entered into a written contract with the Davenport & St. Paul Railroad Company to furnish and erect bridging and piling on that part of the line of the Davenport & St. Paul Railroad, connecting with the *main*

line then completed at or near Duck Creek, and extending thence to and along the bank of the Mississippi River at Warren Street, which said extension was incomplete, the ties and rails not being laid, up to this date.

That in pursuance of this contract he did work amounting to $10,747.30 above payments. That he filed his claim for a mechanic's lien and took all necessary steps to perfect a mechanic's lien, and obtained a judgment therefor for a mechanic's lien. (See record, page 9.)

Replication to this answer page 15.

The judgment sets out that Dennison was notified, but as it was only by publication, it was agreed (record, page 20,) to waive this, and the defence to the lien was to be made without regard to said judgments.

The plaintiffs, Meyer *et al.*, amended their bill as to Hornby (record, page 15).

This amendment alleged that the Davenport & St. Paul Railroad Company was organized in 1869; that after its organization it made a mortgage and built a road about eight (8) miles, from Pine Hill to Eldridge Junction on the main line, and from thence to Maquoketa, about thirty (30) miles; that on May 12th, 1871, Thomas A. Scott and others made a corporation called the Davenport Railway Construction Company to build said road, and made a contract with the Davenport & St. Paul Company to furnish all iron and materials necessary to build said railroad from Eldridge Junction to St. Paul, the Construction Company to grade, bridge and tie the road for the consideration of $20,000 per mile in bonds, and a majority of the stock of the road, which bonds were to be issued and paid to the company in sums of $100,000, as five miles of road should

be finished and be delivered as certified by the Presidents of the said road and the Construction Company.

That afterwards, on February 29th, 1872, the Construction Company agreed to furnish rolling stock for the road.

That on July 1st, 1871, six millions of bonds were issued, which were a first lien on all the present or the thereafter to be acquired property of the road.

That the Construction Company, before it or the Railroad Co. had sold any of the bonds, on March 28th, 1872, and in order to sell the bonds, agreed and guaranteed that the local subscriptions and grants should prepare the road for the iron, and that the Construction Company would make good any deficiency. On the same day, French, Smith, Dennison, Jewett, Carnegie and Oakes Ames, members of said Construction Company, agreed to be responsible for the same thing.

On May 16th, 1872, the stockholders of the Railway Construction Company, to induce the sale of said bonds, guaranteed the same thing; that a prospectus was before the sale of the bonds sent to the sellers of the same in Frankfort, approving of said guarantees and making themselves responsible for the truth of the propositions, which alleged among other things stated, that the road was completed from Davenport to one hundred miles north, and was in operation, and fifty miles more were ready for the rails, and the local subscriptions were to be obtained to prepare the road for the iron. That all these allegations were untrue. That Hornby's work was from Pine Hill to Davenport, about three miles, which was included in the mortgage, made before Hornby's contract, of which he had notice. That Hornby never completed his contract; that he abandoned the work when he brought his suit, because he

was not paid, and the Railroad and Construction Companies were insolvent. The Construction Company, of which he is a member, has sold and received the proceeds of $3,508,000 of the bonds. That the Construction Company having agreed to receive first lien mortgage bonds on all the road, and having agreed with the holders of the bonds to do the very work for which Hornby claims a lien, and having falsely and fraudulently represented that there was no other lien, Hornby can have no prior lien over the mortgage. That at the date of Hornby's contract, and long prior, the mortgage was recorded and the road was completed to a point on the river bluff, about two miles west of Davenport, and connected with Davenport by the Rock Island road.

To this amendment no answer was filed, but this is not important, as all the material facts are admitted by both parties.

The cause was heard upon agreed facts and exhibits, which were admitted. (Record, pages 21, 22, 23, and following.)

That Hornby made the contract of October 9th, 1875, to furnish and pile the road from Duck Creek to Davenport, and that he brought a suit for a mechanic's lien and recovered a judgment, is admitted.

But no notice or claim for a mechanic's lien was ever filed by Hornby in the office of the Clerk of the District Court, as provided by the laws of Iowa.

That the Davenport & St. Paul Railroad Co. was organized May 20th, 1868, and begun the building of the road at Pine Hill, three miles from Davenport, on the 15th of October, 1869, and completed the road to Eldridge Junction, about eight miles from Pine Hill, and thence a branch

line to Maquoketa, about thirty miles, prior to May 12th, 1871. The main line was extended and the road built for operation to Dixon, 12 miles from Eldridge Junction, on February 29th, 1872, to Wyoming, 41 miles, on March 8th, 1872, to Monticello, 58 miles, on May 8th, 1872, to Hopkinton, 66 miles, on August 31st, 1872, to Delhi, 74 miles, on October 15th, 1872, and to Fayette, 116.5 miles, in December, 1873, and has never been completed north of Fayette.

That at the time this suit was brought, the road was only completed and operated between Fayette and Pine Hill, and on the 10th of November, 1876, by the Receiver, with funds furnished by other parties, was completed into Davenport.

That the mortgage was filed in various counties and Hornby knew of the existence of the mortgage when he made his contract.

That on May 29th, 1872, prior to his contract, Hornby became the owner, by purchase from J. H. Berryhill, of nine (9) shares of stock in the Construction Company, and still owns the same; has never been present at any meeting of the stockholders.

The contract of May 12th, 1871, by the Construction Co. to build this road, the contracts subsequently made to furnish rolling stock, the guarantee of sufficient subscriptions to prepare the road for the iron, and to prepare it if there was not, the prospectus, the truth of which was guaranteed, and the falsehood of which is admitted, are all admitted. The following further fact is admitted (record, page 23):

"The Construction Company agreed with the Railroad "Company to furnish the money to make what payments "were made, for building that part of the road from Pine

"Hill to Davenport, and for work on this part of the road, "Hornby claims a mechanic's lien."

The exhibits which are admitted are:

"A"—Articles incorporating the Davenport & St. Paul Railroad Company. (Record, page 25.)

"B"—the mortgage, covering all the present and future property of the road. (Record, page 28.)

"C"—the articles incorporating the Davenport Railway Construction Company. (Record, page 38.)

"D"—the contract of the Construction Company with the Railroad Co. (Record, page 40.) This contract is dated May 12th and 13th, 1871; the Construction Company to furnish iron and materials to build the road, the Railroad Company to prepare it for the iron, and the Construction Company to be paid $20,000 per mile in first mortgage bonds on all the property of the road, and five per cent. over one-half of all the stock of the road.

Exhibit "E" (page 41,) is a supplement to this contract, whereby the Construction Company agrees to furnish rolling stock, which was not provided for in said contract of May 12th, and the same was to be subject to the mortgage.

Exhibit "G" (page 46,) was a guaranty by the Construction Company to satisfy the purchasers of the bonds that the local subscriptions should prepare the road for the iron, and if not, that the Construction Company would make good any deficiency. Attached to this was the personal guaranty of George H. French and Benjamin E. Smith, among others.

Exhibit "H" (page 46,) is a like guaranty by the stockholders of the Construction Company.

Exhibit "I" (page 47,) is a guaranty of the truth of the prospectus dated May 16th, 1872, representing the road as completed to Davenport, and having one hundred miles equipped and in operation, and fifty miles ready for the iron, every word of which was false.

Exhibit "J" (page 50,) is authority by Construction Co. to Sulzbach & Co. to sell the bonds and guaranteeing the truth of the prospectus.

Exhibit "K" (page 51,) stockholders of Construction Company approve the contract to furnish rolling stock and subject it to the mortgage.

Exhibit "L" (page 52,)—explaining that rolling stock should only be paid for out of the surplus net earnings of the road.

DECREE.

The cause was tried by the Court, and a decree made (record, page 55,) that Hornby had a prior lien to the mort gage for $13,176.74, on all the road situate in Scott County.

We herewith annex copies of the laws of Iowa, bearing on the question of railroad mortgages and mechanic's liens.

MORTGAGES.

"SECTION 1283. Any corporation shall have power to "issue its bonds for the construction and equipment of its "railway in sums not less than fifty dollars, payable to "bearer or otherwise, and bearing interest at a rate not ex- "ceeding ten per cent. per annum, and make the same con- "vertible into stock, and may sell the same at such rates, "or prices, as is deemed proper, if such bonds are sold be- "low the par value thereof. They shall nevertheless be "valid and binding, and no plea of usury shall be allowed

"such corporation in any action or proceeding brought to "enforce the collection of said bonds; such corporation "may also secure the payment of said bonds by executing "mortgages, or deeds of trust, of the whole, or any part of "its property and franchises.

"SEC. 1284. Said mortgages, or deeds of trust, may by "their terms include and cover not only the property of "the corporation making them at the time of their date, "but property, both real and personal, which may there- "after be acquired, and shall be as valid and effectual for "that purpose, as if the property were in possession at the "time of the execution thereof.

"SEC. 1285. Said mortgages, or deeds of trust, shall be "executed in such manner as the articles of incorporation, "or by-laws of the corporation, may provide, and shall be "recorded in the office of the recorder of each county "through which the railway of the corporation may run, "or in which any property mortgaged, or conveyed by such "deeds of trust may be situated, and shall be notice to all "the world, of the rights of all parties under the same and "for this purpose, and to secure the rights of mortgagees, "or parties interested under deeds of trusts so executed "and recorded, the rolling stock and personal property of "the company properly belonging to the road and apper- "taining thereto, shall be deemed a part of the road, and "said mortgages and deeds so recorded shall have the "same effect both as to notice and otherwise as to the per- "sonal as the real estate covered by them."

MECHANIC'S LIENS.

"SECTION 2129. No person is entitled to a mechanic's "lien who takes collateral security on the same contract.

"SEC. 2130. Every mechanic, or other person who shall "do any labor upon, or furnish any materials, machinery, "or fixtures, for any building, erection, or other improve- "ment upon land, including those engaged in the construc- "tion or repair of any work of internal improvement, by "virtue of any contract with the owner, his agent, trustee, "contractor, or sub-contractor, upon complying with the "provisions of this chapter, shall have for his labor done, "or materials, machinery or fixtures furnished, a lien upon "such building, erection, or improvement, and upon the "land belonging to such owner upon which the same is sit- "uated, to secure the payment of such labor done, or ma- "terials, machinery, or fixtures furnished.

"SEC. 2137. Every person, except as has been provided "for sub-contractors, who wishes to avail himself of the "provisions of this chapter, may file with the Clerk of the "District Court of the county in which the building, erec- "tion, or other improvement to be charged with the lien is "situated, and within ninety days after all the things afore- "said shall have been furnished, or the labor done, a just "and true account of the demand due him, after allowing "all credits, and containing a correct description of the "property to be charged with said lien, and verified by "affidavit; but a failure to file the same within the time "aforesaid shall not defeat the lien, except against pur- "chasers or encumbrancers in good faith, without notice, "whose rights accrued after the ninety days, and before "any claim for the lien was filed.

"SEC. 2138. The Clerk of the District Court shall en- "dorse upon every account the date of its filing, and make "an abstract thereof in a book by him to be kept for that "purpose and properly indexed, containing the date of its

"filing, the name of the person filing the lien, the amount "of said lien, the name of the person against whose prop- "erty the lien is filed, and a description of the property to "be charged with the same.

"SEC. 2139. The liens for labor done, or things fur- "nished, shall have priority in the order of the filing of the "accounts thereof, as aforesaid, and shall be preferred to "all other liens and incumbrances which may be attached "to or upon such building, erection, or other improvement, "and to the land on which the same is situated, or either "of them, made subsequent to the commencement of said "building, erection, or other improvement.

"SEC. 2141. The lien for the things aforesaid, or work, "shall attach to the buildings, erections, or improvements "for which they were furnished or done, in preference to "any prior lien, or encumbrance, or mortgage, upon the "land upon which the same is erected or put, and any per- "son enforcing such lien, may have such building, erection "or other improvement sold under execution, and the pur- "chaser may remove the same within a reasonable time "thereafter.

"SEC. 2142. Any person having a lien by virtue of this "chapter, may bring suit to enforce the same in the Dis- "trict or Circuit Court of the county wherein the property "is situated."

OF LIMITATION OF ACTIONS.

"SECTION 2529. The following actions may be brought "within the times herein limited respectively after their "causes accrue, and not afterwards, except when otherwise "specially declared: * * * *

"2. Actions to enforce a mechanic's lien, within two

" years from the time of filing the statement in the clerk's " office; * * * * * * "

We assign for error in this cause, that the Court erred in decreeing that Hornby had a prior lien to the trustees under the mortgage, and should have rendered a decree for the trustees.

ARGUMENT.

I.

By the agreed facts, (record, page 24, folio 113,) " It is " agreed that no notice or claim for a mechanic's lien for " said work was ever filed by said Hornby in the office of " the Clerk of the District Court, as provided by the laws of " Iowa," there can be no lien in favor of Hornby, because he has not complied with this law.

Section 2130 of the Iowa Code, printed in this brief, says: " Every mechanic or other person, who shall do any " work or furnish any materials, for the construction or re- " pair of any work of internal improvement, upon comply- " ing with the provisions of this chapter, shall have a " lien," &c.

Section 2137 says: " Every person, except sub-con- " tractors, who wishes to avail himself of the provisions of " this act, may file with the Clerk of the District Court of " the county in which the improvement to be charged with " the lien is situate, and within ninety days after all the " things shall have been furnished, or labor done, a just " and true account of the demands due him, after allowing " all credits, and containing a correct description of the

" property to be charged with said lien, and verified by " affidavits, but a failure to file the same within the time " required, shall not defeat the lien, except against pur- " chasers or incumbrancers in good faith, without notice, " whose rights accrued after the ninety days, and before " any claim for the lien was filed."

It will thus be seen that Hornby never took the initial and necessary act to give him a lien. He never filed in the Clerk's office of the District Court his lien account describing the property on which he claimed a lien.

The law allows the lien claim only on the condition of filing this lien claim.

It will not do to say, that if he filed it after the ninety days, it was good against the mortgage, because the mortgage was dated prior to the lien claim. The mortgage was filed in Scott County in December, 1872; the lien claim was made under a contract abandoned the November previous.

The Supreme Court of Iowa has always interpreted this statute to be mandatory.

In Green & Brothers *vs.* Ely, 2 G. Green, pp. 508–510, the Supreme Court held: " The statute in relation to mechan- " ic's liens being in derrogation of the common law, should " be strictly complied with. Unless those entitled to a lien " come within its provisions, they cannot obtain the aid " for which it was enacted."

Philips on Mechanic's Liens, sections 307, 338, quoting various authorities, says: " The decisions are unanimous " that when a notice is required, it is matter of substantial " requirement, and must be complied with on the part of " the claimants. So strictly are the statutory requirements " to be complied with, that, although a general appearance

" of the defendants may waive defects in the institution of " foreclosure proceedings, yet it does not waive any defect " in the previous notice to create the lien."

The statute does not excuse the filing of the lien claim. No person can have a lien claim without filing his account with a description of the property, before he brings the suit. He is allowed ninety days after the completion of his contract, and longer as against incumbrances, outside of the ninety days; but his lien claim must be filed before he can bring his action, even against the defendant, and and therefore against a mortgagee.

Section 2138 of the code requires the clerk to endorse the date of filing the lien, and to make an abstract in a book kept for the purpose, with the name of the person filing, the person against whom filed, and the description of the property.

Section 2139 says: " The liens * shall have priority " in the order of filing the accounts, and shall be preferred " to all other liens which may attach, made subsequent to " the commencement of said improvement."

In no part of this law does it dispense with the filing and recording of the lien claim, prior to the commencement of the action to enforce it.

The lien can only extend to the property described in the lien claim.

Philips' Mechanic's Liens, section 378: " When a stat- " ute which creates a lien requires a description of the " property, it is a matter of such importance that if none " be attempted, or if attempted, it be so imperfect as not to " answer its office, the lien will fail. Neither can it be ex-

"tended beyond the description of the property in the "claim filed."

II.

It is admitted that Hornby abandoned the work under this contract before it was completed, because the company became insolvent. But if Hornby claims a mechanic's lien which is to override a mortgage, he must perform his whole contract. The subsequent lien claimant may have become so, relying upon the performance of that contract, and the mechanic is not entitled to file a lien claim at all, until he completes his contract.

"The ninety days for notice commences," says the Iowa Supreme Court, "on the day when *all* the work or things "are furnished or performed."

Jones *vs.* Swan, 21 Iowa, 181.

Hornby in this case, abandoned his work on November 1st, 1873, by order of the Railroad Company. (Record, page 11 of Hornby's petition.)

In a case which we shall presently argue to this Court, a mechanic claims and has judgment for a lien in one county, where his whole work was done in another. We believe such to be the tendency of decisions in the Iowa Supreme Court. Whether the Iowa Court has so held, we have no reported decisions, but we contend that the mechanic can have no lien, except on the county where the work is done, and upon the property described in the lien claim, which he must file before he can bring his action.

Section 2142 of the code, printed above, says: "Any "person having a lien by virtue of this chapter, may bring

" suit to enforce the same in the District or Circuit Court of " the county wherein the property is situated."

What property? The property described in his lien claim; " a correct description of the property to be charged " with said lien." * * * " filed with the Clerk of the " District Court in which it is situated."

III.

The act of limitations, in relation to mechanic's liens, also requires this statement to be filed.

Code, § 2529, ¶ 2: " Actions to enforce mechanic's liens " within two years from the time of filing the statement in " the clerk's office."

There is no way by which a party can be entitled to a mechanic's lien, except by filing a statement of his lien claim in the clerk's office prior to bringing his suit for such lien.

IV.

Hornby is barred from claiming any mechanic's lien by reason of his being a stockholder in the Construction Company, and his knowledge of the mortgage before he took this contract of October 9th, 1872.

The Construction Company, before it was a corporation, made a contract to furnish iron, &c., for the Davenport & St. Paul Road, and in payment thereof agreed to take a first mortgage on the whole property, which they furnished, and on the railroad grading, bridging and tieing, which they did furnish, and which mortgage, according to the

opinion of this Court, in Grant *vs.* Strong, 17 Wallace, 623, was a waiver of any lien on this property.

The said Construction Company further agreed to furnish rolling stock, to be subject to said mortgage, which was to be a first lien on all the property.

The said Construction Company also guaranteed that the local subscriptions and grants should prepare the road for the iron, and said Construction Company paid Hornby all that he received on this contract. Mr. Hornby became a member of this Construction Company before he made this contract, knowing that this mortgage had been executed, and consequently knowing its contents.

Hornby, as a member of the Construction Company, is entitled to his share of the bonds secured by this mortgage, and the benefit of said mortgage, and his share of the stock of the railroad.

His associate stockholders in both companies guarantee everything which the Construction Company does.

We freely concede the general rule of law, that a stockholder may contract with his company, but in that respect, he is no better off than any person who receives the benefit of a contract.

The Board of Directors of the Construction Company are the agents and trustees of the corporation, authorized to manage its affairs and make its contracts.

Angel on Corporations, (9th edition,) 272, 280.

They were authorized to accept of these mortgage bonds as a first lien on the property, and the statute of Iowa makes the mortgage a first lien, as of the date of its execution, and notice to all the world from the date of its recording.

The Construction Company is estopped from claiming any lien, by its contract and the mortgage.

Hornby, by becoming a stockholder in the Construction Company, and accepting the benefits of the mortgage and the contracts of the Construction Company, is estopped from claiming a lien against them.

The recitals in these contracts and mortgages estops all parties interested in claiming under them.

Bigelow on Estoppels, 266, 269, and note 271.

A party claiming any benefit under a deed or contract is estopped by all its provisions.

Herman on Estoppels.

Now the contracts acquired a first lien by mortgage. The Construction Company agreed to that, and agreed with the purchasers of the bonds to remove all claims for liens like Hornby's, by guaranteeing payment. It was their intention by these papers to give the mortgagees the first and highest security against all other lien claims.

The acceptance of this mortgage was a waiver of any right to a mechanic's lien.

Philips, § 280, 217.

Grant *vs.* Strong, 17 Wallace. *supra.*

Mr. Hornby as a stockholder, or partner, or joint beneficiary, gets a share and a part of this mortgage lien. He is entitled to it and can make his agents, the Directors, pay it to him.

The estoppels in these contracts and mortgage bind the parties and those who claim under them.

Herman on Estoppels, § 229.

The same book, § 467: "The doctrine of election is

"founded upon the principle, that there is an implied con-
"dition that he who accepts a benefit under an instrument,
"must adopt the whole of it conforming with all
"its provisions and renouncing every right incon-
"sistent with them. This principle is recognized and
"established in this country almost precisely the same as
"in England, and rests upon the equitable ground, that no
"man can be permitted to claim inconsistent rights with
"regard to the same subject, and that anyone who claims
"an interest under an instrument, is bound to give full ef-
"fect to that instrument, as far as he can. A person can-
"not accept and reject the same instrument, or having
"availed himself of it, as to part, defeat its provisions in
"any other part."

Hornby cannot claim the benefit of the bonds and mortgage, which is admitted to be a first lien on the property, and claim a prior lien as a mechanic. He cannot have the benefit of these bonds and mortgage, sell them in the markets of the world, and then claim a prior lien on the property, thus rejecting what is not for his own benefit.

GRANT & GRANT,
For Appellants.

FILED
APR 9 1880
E. W. MIDDLETON, Clerk

IN THE

Supreme Court of the United States.

No. 263.—October Term, 1879.

LEWIS H. MEYER ET AL., APPELLANTS,

vs.

JOHN HORNBY.

BRIEF FOR APPELLANTS.

JOSEPH H. CHOATE,

FOR APPELLANTS.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

No. 263.—October Term, 1879.

Lewis H. Meyer et al., Appellants,
vs.
John Hornby.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The only question presented by this appeal is whether, under the statutes of Iowa, Hornby's lien on the part of the road on which his work was done had priority over appellants' mortgage, and if so, on what property and to what extent.

Under the provisions of the statutes of Iowa, this can only be determined by ascertaining the exact state of facts at the time the work was done for which the lien is asserted.

The code, section 2,139, provides that such a lien shall be preferred to all other liens and incumbrances upon the improvement made subsequent to the commencement of the improvement.

Section 2,141 provides that the lien shall attach to the buildings, erections, or improvements for which they were

furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection, or other improvement sold under execution and the purchaser may remove the same within a reasonable time thereafter.

The plaintiffs' mortgage covers the whole line of the road, including the section from Pine Hill into Davenport, and all the property of the company, present and future. —(Record, p. 31.) The road mortgaged extends from Davenport to St. Paul. The company was chartered in 1868 to construct a road between those two points. Instead of beginning its construction at Davenport as the eastern terminus, it began at Pine Hill, about three miles west of that city, in October, 1869, and had completed the road to Eldridge Junction, eight miles from Pine Hill, and thence a branch to Maquoketa, thirty-two miles, prior to May 12, 1871. On that day the company entered into an agreement with the Davenport Railway Construction Company by which that company agreed to build the rest of the road to St. Paul for bonds to be issued under the plaintiffs' mortgage at the rate of $100,000 for each section of five miles finished and ready for operation. Under this, the road had been completed to Monticello, fifty-eight miles from Pine Hill, by May 8th, 1872. On the *16th of May*, 1872, *the plaintiffs' mortgage was executed*, but was not recorded in Scott County until the 24th day of December, 1872, by which time the road had been completed to Fayette, one hundred and sixteen miles from Pine Hill. There the work stopped, and the road was not extended any further in that direction until the receiver in this suit commenced it under orders of the court.

Although the building of the road from Pine Hill into the city of Davenport was within the charter and the original design of the company and a survey was made, it was never attempted, because of the great expense, and a connection was made from Pine Hill with the Rock Island

road, by which the company's trains ran into Davenport. This continued until the spring of 1872, when the Rock Island company by lowering its grade severed this connection, and the company made a new survey for a road from Pine Hill into Davenport.

At this point Hornby comes in with the written contract with the company, dated 9th of October, 1872, under which the work was done, under which he claims a lien prior to that of the plaintiffs' mortgage. By this contract, made with full notice of appellants' prior mortgage, Hornby was to build the bridging, and to furnish and drive the piling on the line between Duck Creek and the Mississippi River in Davenport. He began work under the contract Oct. 19th, 1872, and continued until Nov. 1st, 1873, when the work being still unfinished, he quit by order of the company, the amount for which the disputed lien is claimed being then due him under the contract, and for which he filed his notice of lien. Further work on the road was entirely abandoned by the company. At the time he began work under his contract, the road had been completed to Delhi, 74 miles from Pine Hill, and shortly after he abandoned the work it was finished to Fayette, 116 miles. When this foreclosure was commenced the railroad was in operation from Pine Hill to Fayette, and on the 10th day of November, 1876, the section from Pine Hill into the city of Davenport was finished by the receiver, under the order of the court.—(Agreed statement of facts, record, pp. 21–25.) It does not distinctly appear in what state of advancement Hornby's work was when he abandoned it, nor to what extent what he did was separable and removable from the road-bed and other work without destroying the whole. It does, however, appear that the grading and bridging was not entirely completed so as to be ready for the laying of the ties and rails.—(Hornby's answer, record, folio 53.)

Hornby filed his claim 28th of Nov., 1873, and in May, 1875, he recovered judgment in the state court, establishing

his debt and lien, but as the plaintiffs herein were served in that suit only by publication, and so had the right, under the laws of Iowa, to open that judgment, it was stipulated between the parties that the whole question of priorities of their respective liens should be contested and determined in this action, notwithstanding the judgment in the state court.—(Stipulation, record, p. 21.) The lien of Hornby, as adjudged in the state court, extended to the entire road and property of the company within the county of Scott, and was not limited to the section from Pine Hill to Davenport, to which alone Hornby's contract and work was limited.

First Point. Under the circumstances of this case the "*improvement*," upon which the respondent is entitled to a mechanic's lien, under section 2,130 of the Code of Iowa, was not the whole railroad, or any part of it north of Pine Hill, but *only the new section from Pine Hill into Davenport*, then for the first time contracted for or undertaken to be built, and to which alone the respondent's work and materials contributed.

The mechanic's lien given by sec. 2,130 is undoubtedly co-extensive with the improvement upon which his work is done and cannot extend beyond it.

So far as regards construction, the piece of road from Pine Hill into the city of Davenport was separate and distinct from the rest of the road.

Canal Co. vs. Gordon, 6 Wallace, 561, seems decisive upon this point. There the statute of California gave to mechanics furnishing labor and materials for the construction of aqueducts a lien upon the aqueduct constructed, &c. The original undertaking of the Canal Co. was to build an entire canal, twenty-five miles long from its reservoir to the American River. Beginning at the reservoir they built about half of it, and in this condition they used it to a certain extent. But it had water for only the three winter months. If extended to the river the supply of water, it was expected, would be increased and be con-

stant. Under these circumstances the company contracted with Gordon for an extension of the work from the end of the part already built to the river. As respects the two parts of the canal the testimony was that both parts were parts of the same work and each necessary to the other; "that to disconnect the two would lessen their value greatly, the work being worth 'very little—valueless'—without the extension to the river." The circuit court decreed the lien to extend to the whole canal and the company appealed to this court, and here it was decided that the lien must be restricted to the section to which the contract and the work of the plaintiff were limited. We quote from the opinion of the court. SWAYNE, J.—"The two sections were constructed by different contractors and at different times. The former was completed and in use before the latter was begun. In these respects they were distinct works. * * * We think the language of the statute rightly interpreted is decisive. The work of Gordon was all done upon the upper section. He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion and lead to serious evils. We have no difficulty in coming to the conclusion that the decree in this particular is erroneous."

This decision seems never to have been questioned in any court, state or federal; has been cited with approval in the text books, and been accepted and acted upon by the profession.

It is evident that the court below, following this decision, limited the lien of Hornby to the section of the road on which his work was done, from Pine Hill into and through the city of Davenport, for while the decree of the state court, originally obtained as against the trustees of the mortgage by default, extended the lien to embrace all the property of the railroad company in Scott County, including the branch to Maquoketa, (record, p. 13,) the de-

cree of the circuit court (record, p. 56) defined it as "on that part of the line of the railroad" * * * "constructed from Pine Hill Cemetery into and through the city of Davenport."

Obvious justice required this, for though the rest of the railroad was only finished from Pine Hill to Fayette when Hornby's contract was made, the road was in running order and actual use over that portion, and by the independent connection over the Rock Island road into the city of Davenport, and Hornby never could have expected or intended to have a lien upon that completed section, with the building of which his contract and his work had nothing whatever to do.

We confidently submit that no case in the courts of Iowa, under such circumstances as here exist, has ever extended the lien of the mechanic beyond the section of road embraced in his contract and work, and to include a completed road built long before, and to which his work and materials contributed not at all.

Every consideration urged by this court in the Canal Co. case for restricting the mechanic's lien to the new section upon which his work was done, applies with still greater force to the limitation contended for in the present case.

Second Point. The same language in the sections 2,130 and 2,139 of the Iowa lien act must necessarily receive the same construction, and it is a logical and necessary conclusion that, as the decree appealed from was right in restricting the lien of Hornby to the new section from Pine Hill into Davenport, it was erroneous in declaring it to be prior and superior to the lien of the mortgage on "the erections, excavations, embankments, road-bed, right of way, and lands," or on anything but the actual bridging constructed by Hornby.

The appellants' mortgage, though subsequent in date to the commencement of the railroad as originally constructed

from Pine Hill to Fayette and beyond, was certainly prior and not subsequent to the commencement of the section from Pine Hill into Davenport, to which Hornby's lien is limited. Sec. 2,139 gives priority to the mechanic's lien over other liens upon the "improvement" *made subsequent to the commencement of the "improvement,"* and unless the "improvement" referred to in this section is to receive another and larger construction than is given to the same word in section 2,130, it means in this case, as in the former section, the new section of road from Pine Hill into Davenport, upon which the appellants' mortgage was prior in date to the commencement of the improvement.

Third Point. The lien itself thus being found to be subsequent to the mortgage, the extent to which it shall have preference over the prior lien of the mortgage is determined by section 2,141, which provides that "the mechanic's lien shall attach to the buildings, erections, or improvements for which they were furnished or done, in preference to the prior mortgage on the land upon which the same is erected or put; and any person enforcing such lien may have such building, erection, or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter."

Here, then, is the first and only distinction drawn by the act between *the building* or *improvement* and *the land* on which it is constructed. The mortgage already existing upon the land before the commencement of the building or improvement, the mechanic's lien for work or materials put upon the building or improvement is limited to the right of sale, under execution, of the latter without the land, with the right of removal to the purchaser.

Thus the largest right which Hornby could have had under any construction of the act would be the right of sale of the building constructed by him without the land upon which it was placed, with the right of removal to the purchaser within a reasonable time.

Fourth Point. But the uniform construction imposed by the courts of Iowa upon section 2,141 has given to the mechanic's lien in such a case much stricter limits. Limiting the *right* to the lien to the *remedy* given by the act for its enforcement, they have made it depend altogether upon the question whether, in the given case, the structure into which the mechanic's work has gone is capable of being removed by a purchaser without destroying or materially injuring the whole work. If not, they hold that he has no enforceable lien as against a prior mortgage.

In *Getchell vs. Allen*, 34 Iowa, 559, there having been a prior mortgage upon the land and a building that stood upon it, a mechanic who added a story to the house, and built a new stable upon the lot, was held to have a lien upon the stable, which could be removed, but not upon the house, because the added story could not be separated and removed by the purchaser.

In *O'Brien vs. Pettis*, 42 Iowa, 293, although an old building had been so far reconstructed as to make almost a new one, yet as parts of the original walls remained a mechanic's lien was denied. The court said: "The defendants' right depends upon the fact as to whether the building upon which their materials were furnished and work done, is so far an independent structure as to be capable of being removed without materially injuring or destroying that which would remain, or whether it is so united with that which was before upon the lot as to constitute substantially one building or structure."

Vid. also *Equitable Life Ins. Co. vs. Slye*, 45 Iowa, 615.

Bear vs. B. C. R. & M. N. Co., 48 Iowa, 619.

In the light of the rule established by these decisions, the right of Hornby to any lien at all, as against the mortgagees, must depend upon whether the bridging and piling erected by him can practically be removed by a purchaser without destroying or materially injuring what shall re-

main. The actual facts as to his work, disclosed by the record, seem not to be doubtful. The decree appealed from itself shows that there was already before his work was done and materials furnished, "the lands, the right of way, the road-bed, embankments, and excavations." His own answer shows (record, folio 53) that when he abandoned the work, not only had the ties and rails not been laid upon the bridging, but that the grading *and bridging itself* had not been entirely completed therefor, so as to be ready for the laying of said ties and rails, and the agreed statement of facts (record, folio 115) shows that after the commencement of this suit the railroad from Pine Hill into Davenport was completed by the receiver under the orders of this court.

It will not, of course, be claimed that the *piling*, whether in embankment or excavation, can be removed without destroying or materially injuring what would remain.

Whether the *bridging* erected upon the piling can be so removed, depends upon facts not disclosed by the record. Certainly it cannot be without destroying the work added by the receiver, to which Hornby can by no theory claim that his lien extends.

The burden of proof was upon him to show the facts necessary to make out his lien, *i. e.*, the essential fact of the removability of the bridging.

It has been uniformly held by the courts of Iowa, and we believe by all other courts, that the statute in relation to mechanics' liens being in derogation of the common law, must be strictly complied with; that unless those entitled to the lien created by the statute prove themselves within its provisions, they cannot obtain the aid for which it was enacted.

Greene vs. Ely, 2 Iowa, 508.

There certainly can be no ground in fact or in law for assuming that the bridging can be removed by a purchaser without the substantial destruction of the whole

structure; and Hornby having failed in the necessary proof of this cardinal element of his case, can have no remedy under the act.

Fifth Point. The decree appealed from should be reversed upon the ground that Hornby has established no right to a lien as against the mortgagees, or at most with instructions to the court below to ascertain whether the bridging constructed by him can be removed by a purchaser without destroying or materially injuring what remains; and in that event only to decree a sale thereof with such right of removal to the purchaser as is practicable, and exempting from the lien and sale the lands, road-bed, right of way, embankments, and excavations, and the additional work put on by the receiver under the orders of the court in this action in completing the railroad.

JOSEPH H. CHOATE,
For Appellants.

OFFICE SUPREME COURT U. S.
FILED
APR 2 1880
D. W. MIDDLETON, Clerk.

NO. 263.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES,
Plaintiffs in Error,

—*vs.*—

HENRY EGBERT, ADMINISTRATOR OF THE ESTATE OF JOHN HORNBY, DECEASED,
Defendant in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR DEFENDANT IN ERROR.

JAMES T. LANE,
Solicitor for Appellee.

Filed ..... *18* ....

NO. 263.

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Defendant in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF PLEADINGS.

On the 4th day of May, 1875, Lewis H. Meyer, as trustee, filed his bill in equity in the Circuit Court of the United States for the District of Iowa, for the foreclosure of a mortgage made by the Davenport and St. Paul Railroad Company on its line of railroad; and, among other defendants, the bill made John Hornby a party defendant, alleging that the lien of the mortgage was prior to any lien or claim of defendant, Hornby.

On the 14th day of July, 1875, the said John Hornby filed in said suit an answer to said bill, alleging, in the 10th division, a claim for $2,408.85, under a contract made with said Davenport and St. Paul Railroad Company on the 22d of March, 1870, to furnish the timber, lumber, and piling, and to do the bridging on the said railroad from Eldridge Junction, in Scott county, Iowa, to Oxford Mills, in Jones county, Iowa, and that a judgment therefor had been recovered against said company in the Circuit Court of said Scott county, Iowa, on the 25th day of November, 1874, for said sum, and claiming a mechanic's lien for said sum, under the laws of Iowa, prior to the lien of the mortgage; and in the 11th division claiming a mechanic's lien, prior to the lien of the mortgage, on the said railroad from Pine Hill Cemetery into the city of Davenport, to Warren street, in said city, being all in said Scott county, Iowa, under a contract made by said John Hornby with said Davenport and St. Paul Railroad Company, on the 9th day of October, 1872, by which he was to furnish and erect the bridging, and furnish and drive the piling, on that part of the line of said railroad, being the extension of said main line of said railroad from said Pine Hill Cemetery into and through the said city of Davenport, to Warren street, a distance of three miles.

That the materials furnished and labor performed under this contract, prior to the 1st day of November, 1873, was $10,747.30, when said Hornby was ordered by said company to quit the said work.

That on the 28th of November, 1873, a just and true account of this claim was duly filed in the office of the Clerk of the District Court of said Scott county, Iowa, with a description of the property, and claiming a mechanic's lien on said part of said railroad, in accordance with the laws of Iowa.

That on the 20th day of February, 1875, a suit was properly instituted in said District Court of said Scott county, Iowa, by said Hornby, against said railroad company and William Dennison, surviving trustee on said mortgage, parties defendant, and praying for a mechanic's lien on said part of said railroad.

And on the 5th day of May, 1875, after full service of the notice of said suit, under the laws of Iowa, upon the said defendants, a final decree was duly entered in said suit in favor of said

Hornby, and against said railroad company, for $11,723.40, with interest and costs, and declaring the same to be a mechanic's lien on said part of said railroad prior and superior to the lien of said mortgage; and said answer avers that said decree is still in full force and effect, unreversed, and praying that the same be declared also a prior lien to that of said mortgage—a certified transcript of said judgment and decree being attached to said answer and made part of it.

To this answer Lewis H. Meyer, appellant and plaintiff in said bill, on the 14th day of August, 1875, filed his replication.

On the 25th day of May, 1877, Lewis H. Meyer and William Dennison, trustees, appellants, filed in said Circuit Court of the United States for the district of Iowa, an amendment to their bill as against the claim of John Hornby, set up in his answer, alleging that said Davenport and St. Paul Railroad Company was organized in the year 1869; that on the 12th of May, 1871, a corporation under the name of the Davenport Railway Construction Company was organized under the laws of Iowa, but on the 12th or 13th of May, 1871, and before the articles of incorporation were recorded, as required by the laws of Iowa, and before the incorporators, under the name of the Davenport Railway Construction Company, became a corporation, and while yet a partnership, made a certain contract with the said Davenport and St. Paul Railroad Company to furnish all the iron and material necessary for the building and furnishing of said railroad from Eldridge Junction to St. Paul, said railroad company to prepare, grade, and bridge the road-bed, and furnish ties for the same; and said construction company was to receive therefor the mortgage bonds of said railroad company at the rate of $20,000 per mile.

That on the 28th of March, 1872, *before the construction company or the railroad company had sold any of the bonds secured in plaintiffs' mortgage*, and after Hornby became a member of the construction company, a certain preamble and resolution were prepared by said construction company, and certain members of said construction company, but not said Hornby, wrote a guaranty, endorsed on said resolution, and afterward, on the 16th day of May, 1872, said preamble and resolution were adopted at a meeting of the stockholders of said construction company.

Said amended bill further alleges that some of the material statements in the said prospectus and resolutions were false; that said construction company having represented to the purchasers of the bonds, by said prospectus and resolutions, that the local subscriptions would be sufficient to prepare the line for the rails, and that, if they were not sufficient, *the construction company* would prepare the road-bed for the rails out of its own resources; and having received the proceeds of the bonds, and having falsely and fraudulently represented to the holders of the bonds that the very work on which Hornby claims a lien was completed and finished before Hornby entered upon the performance of his contract — that therefore Hornby's claim for a mechanic's lien prior to the lien of plaintiffs' mortgage is fraudulent and void in law, and to be postponed to the mortgage; and praying that Hornby's judgment be annulled and cancelled. Plaintiffs also claim that their mortgage was recorded before the commencement of the work by Hornby under his contract, and that therefore the mortgage lien is prior to Hornby's mechanic's lien.

And on the said 25th day of May, 1877, a stipulation, signed by the respective counsel for plaintiffs and for defendant, Hornby, was duly filed in said United States Circuit Court, to the effect that the said answer of the said John Hornby, setting up a claim for mechanic's lien, in the 11th division of said answer, shall be taken and treated as a cross-bill, in all respects as fully as if it had been filed in this suit in form of a cross-bill under the equity rules, and that relief may be granted thereon as fully if said Hornby shall be entitled to relief, and that said cross-bill shall be treated as denied by the replication, now on file, to said answer.

Also, on said 25th day of May, 1877, said plaintiffs and said Hornby filed in said suit a further stipulation, whereby said Hornby waives the conclusiveness of his said decree in said District Court, establishing his mechanic's lien, as set forth in his said answer, as a bar to the said plaintiffs in contesting the priority of said mechanic's lien over said mortgage lien, and agreeing to submit that question to the decision of the said United States Circuit Court in this action, and in all other respects, except the question of the priority of said mechanic's lien over said mortgage lien, the said decree to be taken and held as conclusive.

And on the 25th day of May, 1877, after a full hearing on the merits on the agreed statement of facts, upon the issues thus made in the 11th division of the answer as a cross-bill, the United States Circuit Court (Dillon, Circuit Judge) awarded John Hornby a decree for $13,176.77, and interest at six per cent and costs, and declared the same a lien prior to the plaintiffs' mortgage lien on the erections, excavations, embankments, bridges, road-bed, right of way, and upon all lands upon which the same may be situated on that part of said railroad thus located and constructed from Pine Hill Cemetery into and through the city of Davenport.

And from this decree plaintiffs, Meyer and Dennison, trustees, appeal.

STATEMENT OF FACTS.

The material facts are admitted in a writing filed in this suit and signed by appellants and appellee, and are as follows:

The Davenport and St. Paul Railroad Company is a corporation organized under the general laws of Iowa on the 20th day of May, 1868, to construct and operate a railroad from Davenport, Iowa, to St. Paul, Minnesota, and commenced the construction of said railroad at Pine Hill Cemetery, about three miles from the city of Davenport, on the 15th day of October, 1869, and completed the same thence to Eldridge Junction, about eight miles from Pine Hill Cemetery, and thence a branch line to Maquoketa, a distance of thirty-two miles, prior to May 12th, 1871. The main line was thereafter extended and operated, via Dixon, Wyoming, Monticello, Hopkinton, and Delhi, to Fayette, Iowa, a distance from Eldridge Junction toward St. Paul of 116½ miles, on or before December 1st, 1873, but has never been completed or operated beyond Fayette northwardly.

At the time this suit was begun, the railroad was only operated between Fayette and Pine Hill Cemetery, and the claim of Hornby is for the bridging and piling done to extend the main line from Pine Hill Cemetery into the city of Davenport at its initial point, the *temporary* connection with the C., R. I. & P. R. R. from Pine Hill, connecting with the city of Davenport, having been abandoned.

All of the facts alleged in the 11th division of Hornby's answer, in which his claim is set forth, are admitted to be true, except as to the priority of said mechanic's lien over said plaintiffs' mortgage lien.

The plaintiffs' mortgage was executed on the *16th day of May, 1872*, and was filed for record in said Scott county, Iowa, on the 24th day of December, 1872, and in the other counties in Iowa at a later date, but the bonds under this mortgage were not issued and sold in fact until *after* the 14th day of December, 1872.

Hornby, however, knew of the existence of the mortgage at the time he made his contract under which he claims his lien.

On the 29th day of May, 1872, Hornby became the owner, by purchase from J. H. Berryhill, of nine shares of the capital stock of the Davenport Railway Construction Company, and still owns the same, but was never a director or officer of said construction company, was never present at any of the meetings of the stockholders of said company, and never in any manner, either by proxy or otherwise, authorized any person to represent him or his said shares of stock, or to vote for him, at any meeting of the stockholders of said company.

Articles of incorporation of the Davenport Railway Construction Company were adopted on the 12th day of May, 1871, at Davenport, Iowa, under the laws of Iowa, which were filed for record on the 17th of May, 1871, in the recorder's office, in Scott county, Iowa, where the principal place of business was, but were not filed in the office of the Secretary of State in Iowa until three months after their adoption.

John Hornby has died since the writ of error was allowed, and Henry Egbert, the administrator of his estate, has, by consent of counsel, been substituted, by order of court, as the defendant in error, in place of said Hornby, deceased.

ARGUMENT.

By the decree of the District Court of Scott county, Iowa, Hornby's mechanic's lien is established from the 19th day of October, 1872, and the only question, therefore, under the pleadings and stipulations of the parties, to be contested, is whether the mechanic's lien is prior to the plaintiffs' mortgage lien.

It appears from the facts that the Davenport and St. Paul Railroad Company was organized on the 20th day of May, 1868, and began the work of constructing the railroad at Pine Hill Cemetery on the 15th day of October, 1869, and built the main line to Eldridge Junction, about eight miles, and thence a branch to Maquoketa, a distance of thirty-two miles, *prior to the execution of the plaintiffs' mortgage, on the 16th day of May, 1872.* The contract under which Hornby claims his mechanic's lien was made *on the 9th day of October, 1872*, and the work thereunder was begun on the *19th day of October, 1872*, and ended on the 1st day of November, 1873.

Although Hornby knew the fact of the existence of the mortgage when he made his contract, yet the mortgage was not recorded in Scott county, Iowa, nor in any other county, until the *24th day of December, 1872*, and *no bonds under this mortgage were issued and sold until after the 14th day of December, 1872.*

It is settled by the laws of Iowa, as construed by the Supreme Court of that state, that a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property, by mortgage or otherwise, AFTER THE WORK OF CONSTRUCTING THE RAILROAD HAS BEEN COMMENCED.

> Neilson *v.* The Iowa Eastern Railroad Company, 44 Iowa, 71.
>
> Meyer and Dennison *v.* The Delaware Railroad Construction Company (being Nos. 29, 30, and 260 at October term, 1879), United States Supreme Court (not yet reported).

This decision by this court, it will be observed, is in regard to the priority of a mechanic's lien over the plaintiffs' mortgage on the same railroad.

See, also,

> Davis *v.* Bisland, 18 Wallace, 659.

The work of constructing the railroad was BEGUN IN OCTOBER, 1869, and eight miles of the main line, with a branch thirty-two miles to Maquoketa, WAS CONSTRUCTED BEFORE THE MORTGAGE OF PLAINTIFFS WAS *executed*, which was on the 16th day of May, 1872.

Hornby's contract was made on the 9TH OF OCTOBER, 1872, and his work was begun thereunder on the *19th day of October, 1872;* but the plaintiffs' mortgage was not recorded in Scott county, Iowa, where Hornby's work was done and his lien claimed, until the 24TH DAY OF DECEMBER, 1872.

The work of the construction of the railroad having been begun long PRIOR to the execution and recording of plaintiffs' mortgage, under these authorities it is clear that Hornby's mechanic's lien takes precedence of the mortgage. This, we believe, is conceded by the appellants' counsel.

But it is claimed that, in consequence of the false representations and the breach of the guaranty made by the Davenport Railway Construction Company to induce the sale of the bonds under plaintiffs' mortgage, Hornby, being a stockholder in said construction company, is estopped, in same way, to assert his priority in this action.

The contract of guaranty which it is claimed was broken, and the representations which are claimed to be false and fraudulent, are contained in exhibits "G" and "H," on pages 46 and 47, and in exhibits "I" and "J," on pages 47, 48, 49, and 50, of the printed record. The proposition that Hornby is estopped to assert his priority is maintained, as we understand it, by appellants' counsel, on these grounds:

The contract to furnish the iron and materials for building the railroad (see exhibit "D," page 40 of the printed record), was made by the Davenport Railway Construction Company on the 13th day of May, 1871, and the articles of incorporation of the construction company were not filed for record in the county recorder's office until the *17th* day of May, 1871; that, therefore, the construction company were only a PRIVATE COPARTNERSHIP OF THE INCORPORATORS UNTIL THE 17TH DAY OF MAY, 1871, and as *such copartnership*, and *not as a corporation*, made the said contract with the Davenport and St. Paul Railroad Company on

the *13th day of May, 1871*, and that all of the subsequent contracts of guaranty and false representations made by the said construction company relate back to the said contract of the 13th day of May, 1871, and are also made by the company as a *private copartnership*, and not as a corporation; and that John Hornby, having purchased stock in the construction company on the 29th day of May, 1872, although AFTER these resolutions and prospectus had been adopted by the company, thereby became a member of said copartnership before any of the bonds under plaintiffs' mortgage were sold, and is, therefore, estopped to assert a lien prior to that of the mortgage.

Before discussing the question whether or not the construction company was a *corporation* or a *private copartnership* in making these contracts and representations, we will examine the question whether or not Hornby became a member of this copartnership, and, even if he did, how far he became personally bound and estopped to assert his mechanic's lien.

Conceding, then, only for the purpose of the argument (a proposition which we utterly deny), that the contract made in the name of the Davenport Railway Construction Company with the Davenport and St. Paul Railroad Company, to furnish the iron and materials, except preparing the road-bed, for said railroad, was entered into on the 13th day of May, 1871, by the incorporators as a *copartnership*, and *not as a corporation*, we proceed to inquire how far this fact affects Mr. Hornby in this action.

1st. How can it be maintained that the contract of guaranty and the letter to Sulzbach and the prospectus were made by a copartnership? These were all made in *1872*, while the articles of incorporation were filed in the recorder's office after their adoption, on the 17th day of May, *1871*, and certainly the company thereafter was a *corporation*, and *not a copartnership;* and hence the guaranty and letter to Sulzbach and prospectus were made by the *corporation* as such, and not as a private copartnership. It is true that several of the persons who compose the corporation added their personal guaranty to that of the corporation, but Mr. Hornby was not among these.

2d. But even if the guaranty and representations alleged were made by the company as a *copartnership*, how and when did Hornby become a member of said copartnership, and how did he

become bound by the contract of guaranty and by the representations? He was not one of the incorporators, and never had anything to do with the company as an officer, or as a member of it, *prior* to the 29th day of May, 1872, when he purchased nine shares of the capital stock in the company from Berryhill; and he never attended any of the meetings of the stockholders, and never authorized any person, either by proxy or otherwise, to represent him or his shares of stock, or to vote for him, at any of the stockholders' meetings. It is not claimed that he ever knew of these resolutions and letters and prospectus, or had any personal knowledge of their adoption, or ever in any manner approved or ratified them.

It resolves itself, then, into this simple proposition: Does the purchase of shares of the capital stock of a company intended and believed to be incorporated render the purchaser liable as a copartner for all the engagements of the company? Mr. Hornby, not being an original incorporator, is not in the category of those who might be held bound, at their peril, to see that the law was fully complied with in the organization of the corporation.

He is simply a purchaser and owner of stock in the company after it is organized, and does not in any manner personally participate in the conduct or management of its affairs.

The first resolution or guaranty (see exhibit "G," page 46 of printed record), was passed on the *28th day of March, 1872;* the resolutions of the stockholders, at their meeting in New York city, were adopted on the *16th day of May, 1872;* and the letter to Sulzbach authorizing him to sell bonds, and the prospectus and the resolutions authorizing him to sell bonds, were adopted on the *16th day of May, 1872.*

Hornby did not purchase his shares of stock until the 29TH DAY OF MAY, 1872; and never had been in any manner a member of the company prior to that time.

Supposing, then, that these several contracts were made by the company, believing it was a legal corporation, but, through neglect to comply with some requirement of the general laws of Iowa, it had failed to become incorporated, and was only, in fact, *a copartnership,* would the *bare purchase and ownership of shares of stock,* on the belief that it was a legal incorporation, and without any knowledge that it had failed to become fully organized, or that it

was acting as a copartnership, render such purchaser and owner liable for the previous engagements of the company? The affirmative of that proposition cannot be maintained upon any principle or rule of law, and is contrary to all the decisions and analogies of the law of corporations.

The fact remains, that on the 16th day of May, 1872, when the contract of guaranty was made, and the prospectus issued, Hornby was not an owner of stock in the company, *and was not a member of the company.*

If the company were but a copartnership, and the purchase of Berryhill's stock (one of the copartners) by Hornby, made him a member of the copartnership, then, under the well-settled principles of partnership, a *new copartnership* was thereby formed, and the *new firm* would not be liable for the debts and engagements of the *old firm* only so far as it expressly assumed them.

WAS THE COMPANY A COPARTNERSHIP?

We now proceed to discuss the question which lies as a base of the plaintiffs' argument, namely, that by the failure to file the articles of incorporation on the day of their adoption, and not until the *17th day of May, 1871*, the incorporators of the Davenport Railway Construction Company, notwithstanding that they acted and believed that they were legally incorporated, were only a *private copartnership until after the 17th day of May, 1871*, when they became legally incorporated.

The material provisions of the statutes of Iowa in force at the time of the organization of this corporation (see Revision of 1860, Title 10, Chap. 52), are:

"SEC. 1150. Any number of persons may associate themselves and become incorporated for the transaction of any lawful business." * * *

"SEC. 1151. Among the powers of such body corporate are the following:

"1. To have perpetual succession;

"2. To sue and be sued by its corporate name;

"3. To have a common seal, which it may alter at pleasure;

"4. To render the interests of the stockholders transferable;

"5. To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared;

"6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;

"7. To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law, and not incompatible with an honest purpose."

"SEC. 1152. Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor;" "and in the office of the secretary of state, in a book kept for that purpose" (see amendment, acts of 13th general assembly, 1870, chapter 172, page 218).

"SEC. 1154. A notice must also be published for four weeks in succession in some newspaper as convenient as practicable to the principal place of business."

SEC. 1155 specifies what the notice must contain.

"SEC. 1156. The corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall he valid if the publication in a newspaper is made and the copy filed in the office of the secretary of state * * within three months from such filing in the recorder's office" (see amendment, laws 13th general assembly, chapter 172, page 218).

"SEC. 1166. A failure to comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of all the stockholders liable for the corporate debts. But this section shall not be deemed applicable to railway corporations and corporators, and stockholders in railway companies shall be liable only for the amount of stock held by them in said companies."

"SEC. 1167. Either such failure or the practice of fraud, in the manner hereinbefore mentioned, shall cause a forfeiture of all the privileges hereby conferred, and the courts may proceed to wind up the business of the corporation by an information in the manner prescribed by law."

"SEC. 1172. Nothing herein contained exempts the stockholders from individual liability to the amount of the unpaid installments

on the stock owned by them, or transferred by them for the purpose of defrauding creditors, and an execution against the company may to that extent be levied upon such private property of any individual."

SEC. 1173 provides in effect that the private property of the stockholders cannot be levied upon while corporate property can be found.

"SEC. 1180. Persons acting as a corporation under the provisions of this chapter *will be presumed to be legally incorporated until the contrary is shown;* and no such franchise shall be declared actually null or forfeited except in a regular proceeding brought for that purpose."

It seems very clear, from these statutes, that the corporation begins its *existence from the time of the adoption of its articles of incorporation.*

It is true that section 1152 provides that "previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be recorded;" * * * and section 1156, that "the *corporation* may commence *business* as soon as the articles are filed in the office of the recorder of deeds, and their *doings shall be valid* if the publication in the newspaper is made and the copy filed in the office of the secretary of state within three months from such filing in the recorder's office;" but the *corporation* itself begins before the commencement of *the business* of the corporation, and the *corporate life* dates from the adoption of the articles of incorporation.

The Davenport Railway Construction Company adopted its articles of incorporation on the 12th day of May, 1871, and *it was incorporated as a company from that date.* Whatever it did after that was done as a *corporation.*

Whatever may be affirmed of the validity or invalidity of their acts *after* the adoption of articles of incorporation, and before the filing of the articles in the recorder's office, it is clear that such acts were done as a *corporation,* and not as a *private copartnership.*

The "*doings*" in the interim, even if *invalid,* do not render the individual incorporators liable as *copartners.*

This was directly so held by the Supreme Court of Iowa in The National Bank *v.* Davies, 43 Iowa, 424, a case in which the stockholders of this *very same corporation* were sought to be held liable as *copartners* on failure of the incorporators to comply with the various provisions of the statute in relation to organization and publicity of the company.

On page 437, after quoting section 1180 of the Revision, the court say: "Now the persons composing the construction company 'are acting as a corporation.' Under this statute they are to all intents a corporation, in contemplation of law, until the franchise is taken away; *this has never been done.* How can it be said that the stockholders are no longer a corporation, but are liable as *partners?* The position is utterly untenable."

And again: "Suppose it to be admitted that the acts of incorporation, for the irregularity shown, viz, the failure to file the articles of association in the office of the secretary of state, are *invalid*, where do we find authority for holding that, on account of such irregularities, the stockholders are individually liable?" It is said that the "doings"— their acts of organization — are invalid, and they are no longer a corporation, and are liable as COPARTNERS. But section 1180 provides that they shall be a corporation until dissolved; the position, therefore, conflicts with this section. The word "doings," therefore, cannot relate to their acts of organization. If it be other acts that are void, *and it must be, then the stockholders are not liable,* for the *corporation* still exists, and there is no statute that makes them liable except for failure to comply with the requirements relating to publicity of the organization, and to the organization itself."

As this is a direct construction of the statute, and in reference to its application to the organization of the same corporation now before the court, we think it is the rule of this court to accept such construction as conclusive.

In Pollard *v.* Bailey, 20 Wall., 520, the court say: "The individual liability of stockholders in a corporation for the payment of its debts, is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the pur-

poses of its creation and provide for the manner of its enforcement." This statutory liability is *penal*, and must be strictly construed.

> The Providence Steam Engine Co. *v.* Hubbard, No. 65, October term of U. S. Supreme Court, 1879, reported in Chicago Legal News, January 10th, 1880, page 143.

We have discussed the question as though the contract with the Davenport and St. Paul Railroad Company was in fact made by the company on the precise date which is shown in the exhibits, but we submit that there is no evidence except these exhibits as to when the contract was in fact made; and in seeking to enforce a *penal* liability, plaintiffs must show something more, as it may well be presumed that these were all cotemporaneous with recording the articles. Before a court of equity will impose such severe consequences upon the incorporators, who acted in good faith, and believed they were acting as a corporation, and not binding themselves as individuals, it will require strict proof that the contract was not only *signed*, but was in fact *delivered* and *completed* before the recording of the articles.

But Hornby was not one of the incorporators, nor was he a member of the company until May 29th, 1872; and all the acts of the company done and performed *after* he became a member were done as a *corporation*, and not as a *private copartnership*. The only alleged "doings" or contract that was made before the articles of association were recorded, and which is claimed to have been done by the company as a *copartnership*, is the making of the contract to furnish the iron and materials necessary after the grading and preparing the road-bed by the *Davenport and St. Paul Railroad Company*.

This is not a contract made with *the plaintiffs, or the cestui que trust* whom they represent; nor can *they* enforce this contract. But it will not be claimed that there is anything in *this contract*, or any breach of it by the construction company, that can be urged successfully as an estoppel on Hornby. Even if the incorporators are liable under it as partners, it is only to the *Davenport and St. Paul Railroad Company, and not to the plaintiffs.*

The only contract or representations which the plaintiffs can claim, with any force, to be an estoppel, are the resolutions of guaranty and the letter to Sulzbach, and the prospectus adopted on the 16th day of May, 1872, and *before* Hornby was a member of the company. At the time these were adopted and acted upon by the company, it was a *legal corporation*, and, beyond all question, had been since the filing of the articles of association in the recorder's office, on the 17th of May, 1871. These acts were done by the company *as a corporation*, and were so understood to have been done by the plaintiffs and the bond purchasers whom they represent.

So far as the plaintiffs are concerned, they have no connection with the contract made by the construction company with the Davenport and St. Paul Railroad Company, and their contracts are not dependent upon it. Even if this contract *were* made by the company *before* it was legally authorized to do business by filing its articles in the recorder's office, clearly the subsequent guaranty and letters were adopted by the company as a *corporate body* long after it had become a legal incorporation.

We are unable to perceive any principle of law by which this corporate action of the company can be held to estop Hornby, as a stockholder, from enforcing his mechanic's lien on the railroad as against the purchasers of the bonds, who relied upon the guaranty and representations of the *corporation*.

But even on the ground that the guaranty and letter were adopted by the company as a *copartnership*, of which Hornby was a member, we submit, in great confidence, that it was *beyond the scope of the partnership*, and without authority, so far as Hornby is concerned, and cannot bind him.

If Hornby became a member of the copartnership simply by his ownership of nine shares of stock, let us inquire of what copartnership he thereby became a member, and what was the scope of its powers.

The articles of incorporation, or, rather, of *copartnership*, declare the general nature of the business to be transacted "is furnishing material for and the building, making, and equipping of railroads in the state of Iowa, and all proper extensions of the same in ad-

joining states;" and the "*copartnership*" shall have "power to make contracts with individuals or with other companies for the performance of labor upon and the furnishing of materials to railroads; may buy, sell, and convey lands; receive, purchase, hold, sell, and exchange such bonds, stocks, and other securities as may, in the judgment of the company, be needful for the purpose of carrying into effect the object of this incorporation." (See articles, page 38 of the printed record.)

A substantial part of the guaranty, a breach of which is relied upon, is that the local subscriptions and grants to the Davenport and St. Paul Railroad Company shall be sufficient to prepare the whole line for the rails, as is required by the terms of the contract made with the construction company, which agrees to make good any deficiency, and to finish the preparation of the line for the rails out of its own resources.

It will be observed that, by the terms of its contract, the construction company had nothing to do with the preparation of the line for the rails. The grading, bridging, putting in ties and tiles, and preparing the entire road-bed, was to be done by the Davenport and St. Paul Railroad Company, and the construction company was *only* to furnish all the iron and material necessary for the building and furnishing of the road with stations, side-tracks, shops, depots, turn-tables, and water-tanks, after the road-bed is graded and finished, ties furnished, and right of way secured, by the Davenport and St. Paul Railroad Company, and, by a subsequent agreement, to furnish, also, the rolling stock necessary for local traffic.

The preparation of the road-bed was not a duty nor obligation upon the construction company, for it was expressly agreed, in the contract, that the Davenport and St. Paul Railroad Company should perform that duty.

The powers of the construction company must be determined, therefore, by the terms of its contract with the Davenport and St. Paul Railroad Company, which define its business and limit its powers.

It has nothing to do with the local grants and subscriptions, either in receiving, collecting, or expending them; and the con-

tract of guaranty that they will prove sufficient, and will be properly expended, is beyond the scope of its powers.

In the letter to Sulzbach, the two companies "declare ourselves jointly and severally responsible toward you, your substitutes, and all third parties and persons thereto interested, *for the veracity and the true and exact* statement of all *therein-mentioned facts*, * * * and shall be jointly and severally bound to enter on your * * * or your substitutes' stead, * * * as defendants, should the holders of the said bonds ever bring any claims or actions in law or equity against you, * * * and to hold you or your substitutes harmless and indemnified against all damages arising out of such claims or action."

The same observations apply to this as to the contract of guaranty.

It may be urged that the power to *receive* and *sell bonds* would clothe the company with the authority to make these declarations of fact, in order to sell these bonds in Europe.

It cannot be claimed that any of the *facts* set forth in the *prospectus* (see pages 48, 49, and 50 of printed record) are not true as there represented. The only reference to the sufficiency of the local subscriptions in the prospectus is as follows: "By the terms of the contract for the construction of the line, sufficient local subscriptions to the share capital of the company *are to be obtained* to prepare the line for the rails, so that the proceeds of the bonds are only required for the purchase of rails and equipments; and, in addition to these purchases, bondholders will therefore possess the additional security imparted by a large share capital, expended, *or to be expended*, in the grading, bridging, and tieing of the line." (See page 49 of printed record.)

Here it is *not* represented as a fact that *the local subscriptions are sufficient*, but only that "sufficient local subscriptions to the share capital of the company *are to be obtained*."

Insurance Company *v.* Mowry, 96 U. S. R., 544.

In its strongest aspect, it can only be claimed to be a contract, on the part of the company, that it will *endeavor to obtain* these local subscriptions, and its liability would be measured by the degree of care and diligence exercised by it in the effort to obtain such subscriptions.

There are no averments, and no proof, in the record, upon which to maintain such a liability.

It might also be a question whether or not the right of action for breach of said contract is a separate right in each bondholder, and to be enforced only by a separate, individual action. It is clear that the damages sustained may not be the same with each bondholder; and if the plaintiffs may not, therefore, maintain an action for all the bondholders jointly, it is doubtful that they can set up, in this action, such individual and separate rights of each bondholder, and urge them in the nature of an estoppel.

In an action by each bondholder, Mr. Hornby would have a right to show that the bondholder did not rely upon these representations in the purchase of his bonds, and that he suffered no damages. Of this right he is denied if the plaintiffs can successfully set up the estoppel in this action, as claimed.

If, on the other hand, Mr. Hornby is to be regarded, not as a member of a private copartnership, but as a stockholder in a corporation, then it seems clear that, whatever remedies a creditor of the corporation may have against it and its property, his remedy, as against the stockholder, is restricted to the amount of the unpaid installments on his stock, and only in the manner specially named in the statute.

This construction company having been determined by the Supreme Court of Iowa (see First National Bank *v.* Davies, 43 Iowa, 424), to be a "railway corporation," the liabilities imposed by sections 1166 and 1338 of the Revision of 1860 do not attach to its stockholders, and they are only liable to the amount of their stock.

Section 1084, Code of Iowa, provides that "before any stockholder can be charged with the payment of a corporate debt, an action shall be brought against him, in any stage of which he may point out corporate property subject to levy;" and section 1083 provides that in no case "can his private property be levied upon for the payment of a corporate debt while corporate property can be found with which to satisfy the same."

By section 1085, "when the private property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution."

While it is averred, in the amendment to plaintiffs' petition, that the construction company is *insolvent*, it is not averred, nor is it shown, in any manner, that any judgment has been recovered against the corporation, and that an execution has been returned "no property," or anything equivalent to it; nor has any action been brought against Hornby by the plaintiffs, or by those whom they represent.

The liability of the stockholders is *only* that which the statute prescribes; and the remedy of the creditors of the corporation to enforce this liability is only that which the statute gives, and no other.

Hornby has a right to insist upon the strict compliance, by plaintiffs, with these requisitions, because, under the statute, he is entitled to bring an action for indemnity against the corporation, and for *contribution* against the other stockholders; and these judgments against the corporation, and against him, by the creditors, are essential to his maintenance of his actions against the company and against the other stockholders.

It will be observed that the contract between the railway company and the construction company was only for "the iron and materials necessary for the building and furnishing the * * * railroad * * * *from Eldridge Junction, in Scott county, Iowa, to St. Paul, in the state of Minnesota;*" and did not embrace the road, or any part of it, *from Eldridge Junction south to the city of Davenport*, and therefore did not apply to the part of the line of extension *from Pine Hill Cemetery to the city of Davenport*, on which Hornby's lien is established by the decree.

The guaranty on which appellants rely (see exhibit "H," pages 46 and 47 of printed record), is "that the local subscriptions and grants to the said company are and *will* be sufficient to prepare the whole line for the rails, *as is required by the terms of the contract made with the company for its construction.*"

The representations in the prospectus are to the same effect, and apply to the line from Eldridge Junction northwardly, and *not* to the part of the line southwardly from Pine Hill Cemetery to Davenport.

It is very plain, then, that the contract of guaranty and the representations in the prospectus do not apply at all to the part of the

line of railroad over which Hornby claims his mechanic's lien, and the allegations of the bill and amended bill on this point are not sustained.

Nor is it true, as alleged in the amended bill, that the company falsely represented that "the very work on which Hornby claims a lien was completed and finished before Hornby entered upon the performance of his contract."

The only representations in the prospectus on this point, are that "one hundred miles of the line are already completed and in operation from Davenport, and fifty miles more are ready for the rails; the work of grading, bridging, and tieing thereof having been done."

The amendment to the bill (see page 19 of printed record) alleges that, at the time these representations were made, the line was completed from Eldridge to Duck Creek, west of Pine Hill, and the company "had also completed, and in use and operation, its road from the Duck Creek station westwardly to the Rock Island railroad, at a point on the river bluff about two miles west from Davenport, and was there connected with the Rock Island railroad, and thus had complete connection with the town of Davenport over the Rock Island railroad.

After a change in the grade of the Rock Island road the Davenport and St. Paul Railroad Co. severed its connection with that company and undertook to construct its own main line from Duck Creek, or Pine Hill Cemetery, to Main street, in the city of Davenport.

It will be seen from the agreed statement of facts (see page 22 of printed record), that on the 15th of October, 1872, and *before* any of plaintiffs' bonds were sold, the line was completed from Duck Creek to Eldridge Junction, eight miles, and thence to Delhi, the further distance of seventy-four miles, and from Eldridge Junction to Maquoketa, a branch line of thirty-two miles, making in all one hundred and fourteen miles completed.

The representations in the prospectus are, therefore, substantially true.

REPLY TO APPELLANTS' ARGUMENT.

We had prepared our argument thus far before we had seen the printed argument of appellants' counsel, which we have received to-day, and we proceed, briefly, to reply to it.

STATEMENT OF THE CASE.

Appellants' counsel have not been entirely accurate in their statement of the case.

1st. It is not true that appellee agreed that the defence to the lien was to be made *without regard to said judgment*, as stated on page 2 of the argument. The agreement is set out on pages 21 and 22 of the printed record, and concludes: "*In all other respects, except the question of priority of said mechanic's lien over said mortgage lien, the said judgment and decree are to be taken and held as* CONCLUSIVE."

2d. Appellants' counsel say that no answer was filed to the amendment to the bill. The material averments are set forth in the original bill, and the answer of Hornby is responsive to the entire bill. Besides, it is conceded by the learned counsel for appellants that the material facts are all admitted by both parties, in writing, and as it was stipulated in writing (see page 20 of printed record) that the 11th division of Hornby's answer should be treated as a cross-bill denied by the replication, and relief should be granted to Hornby as fully as if he had filed a cross-bill under the equity rules, and inasmuch as the cause was submitted in the court below upon this understanding, we submit that this court ought not to treat it in any other light.

3d. The learned counsel for appellants, by some strange inadvertency, make the following fatal and egregious error in their statement, and predicate their chief argument upon it, viz:

"But no notice or claim for a mechanic's lien was ever filed by Hornby in the office of the clerk of the District Court, as provided by the laws of Iowa."

As this is a material and fundamental fact, plainly set forth in the record, we are unable to see how it could have escaped the attention of the learned counsel, unless very great carelessness was exercised in the preparation of their statement and argument. There is an "agreed statement of facts" twice printed in the record — once on pages 21 and 22, and again on pages 24 and 25. The 1st paragraph of this statement is as follows:

"The facts set forth and alleged in the 10th paragraph, or division, of the answer of said Hornby, filed in this suit, are admitted to be true, but it is agreed that *no notice or claim for a mechanic's lien for said work was ever filed by said Hornby in the office of the clerk of the District Court, as provided by the laws of Iowa.*"

We presume that the learned counsel must have been *misled* by this admission, for it relates to another and entirely different claim than the one for a mechanic's lien now before this court, and one abandoned, so far as priority over plaintiffs' mortgage is claimed, in the court below, and which is still pending in that court, on claim that it should be paid out of the income of the railroad in the hands of the receiver, on other grounds.

It is set forth in the *10th division of the answer;* and although a mechanic's lien is claimed, it is not alleged that any notice was ever filed as required by the laws of Iowa, and, indeed, none ever was filed, as is admitted in the agreed statement, and for that very reason the claim for a lien prior to the mortgage was abandoned in the court below, notwithstanding a judgment had been recovered on it in the state court.

The claim in controversy, before the court on this appeal, is the one set forth in the *11th division of Hornby's answer;* and it is distinctly alleged in the 11th division (see page 11 of printed record) "*that on the 28th day of November, A. D. 1873, this defendant caused to be filed in the office of the clerk of the District Court of said Scott county, and state of Iowa, a just and true account of the said demand due him, after allowing all credits, and containing a correct description of the property to be charged with the lien and verified by affidavit, and took all the requisite and necessary steps, under the laws of the state of Iowa, to complete and perfect his claim for a mechanic's lien, as hereinbefore more particularly described, for said sum so due him, with the interest thereon.*"

In the "agreed statement of facts," on pages 21 and 22, and again on page 24, of the printed record, it is stipulated by the plaintiff and Hornby, as follows:

"2d. *The facts alleged and set forth in the 11th paragraph, or division, of the answer of said Hornby, on file in this suit, are admitted to be true,* except as to the priority of said mechanic's lien over said mortgage lien of plaintiffs, which is submitted to the court under the *agreement* between plaintiffs and said Hornby, heretofore filed in this suit, and no claim of right or law, if made in said paragraph, is admitted."

The fact, then, that Hornby did file a notice of his claim in the office of the clerk of the District Court, as required by the laws of Iowa, with a correct description of the property upon which he claimed his mechanic's lien, is distinctly alleged in the 11th division of the answer, and is expressly admitted in the agreed statement of facts to be true.

4th. It is not correct that the contracts of guaranty, and the prospectus and its falsehoods, are admitted, as stated on page 5 of the argument. The exhibits which purport to be copies of these papers are agreed to be received in evidence, so far as they are competent, as if they were the originals whose execution was duly proved. The admission goes no further than this.

5th. The learned counsel also quote as follows, *as admitted:* "The construction company agreed with the railroad company *to furnish the money to make what payments were made for building that part of the road from Pine Hill to Davenport, and for work on this part of the road Hornby claims a mechanic's lien.*"

Now, the plain statement of facts, on page 23 of the record, is this: "By arrangement with the construction company, the Davenport and St. Paul Railroad Company having no means to do this work, *the said construction company furnished the money to make what payments were made for building the part of the road from Pine Hill to Dvaenport.*" * * *

The construction company "*furnished the money,*" but did not "*agree to furnish money,*" as stated by counsel. There is a manifest distinction between *furnishing the money that was paid,* and agreeing to furnish the money for building the road over this part of the line.

6th. The 1st and 3d points in appellants' argument are founded on the *erroneous fact* that no notice of his lien was ever filed by Hornby, as required by the laws of Iowa. As this is plainly shown by us to be a *mistake*, we do not deem it necessary to make further reply.

7th. In the 2d point it is urged that Hornby *abandoned* the work under his contract, and, therefore, is not entitled to a lien. Without conceding this to be a sound proposition of law, we only deem it necessary to say that it is specifically alleged in the 11th division of the answer (see page 11 of record) that Hornby "*was by the Davenport and St. Paul Railroad ordered to quit the said work;* and this fact is admitted to be true in the "agreed statement of facts" (see page 24 of record).

A mechanic's lien would be a very uncertain security, if after the materials were furnished and the work nearly finished, but before it was actually completed, the owner could *order the mechanic to quit*, and thereby defeat his lien. Such, we submit, with great confidence, is not the law.

8th. The fourth and last proposition argued by appellants' counsel is that Hornby is barred from claiming any mechanic's lien by reason of his being a stockholder in the construction company, and his knowledge of the mortgage before he took this contract of October 9th, 1872.

We have already discussed this question somewhat fully, and we now content ourselves with a brief remark on the *fallacy* upon which appellants' counsel seek now to place this estoppel.

It is argued that the construction company is estopped to claim a mechanic's lien, and that Hornby, by becoming a stockholder in the company, is also estopped from claiming a mechanic's lien.

Without stopping to inquire further than we have already done in a previous part of our argument, how far the construction company is estopped, we submit that it is a "*non sequitur*" that a stockholder, as such, is estopped whenever the corporation in which he owns stock is estopped.

This is a *novel* doctrine in corporation law.

Hornby, *as a stockholder*, has nothing to do with the mortgages and contracts made by the construction company with *third* parties. He is neither a party to them in law in any manner, nor is he in any way bound by them; he could not sue on them as a party in law, nor could he be sued upon them by third parties, except to make him liable to the amount of the unpaid installments on his stock, for a debt due by the corporation.

Hornby makes no claim under the mortgage or contract of the company, and could not if he wished to do so, for he is not a party in any manner to either. So far from claiming anything under or through the mortgage or these contracts of the construction company, Hornby's whole claim is entirely opposed and adverse to them.

The statement, therefore, of appellants' counsel, that Hornby claims any benefit under the mortgage, or under the contract of the construction company with the railroad company, is utterly fallacious; and the argument based on this fallacy of estoppel by Hornby, because he claims a benefit under the mortgage, falls to the ground with it.

How Hornby can get a share or part of this mortgage lien, or how he can make the directors, as his agents, pay it to him, as stated and urged by the learned counsel, passes all of our knowledge.

The authorities cited on estoppel, therefore, have no application to this case.

We submit, in conclusion, that there is no error, and that the decree should be affirmed, with damages for the delay which appellants have, without reasonable cause, interposed to the payment of this just debt, the benefits of which appellants have been enjoying since 1876, by the completion and use of that part of the road.

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